SUPREME COURT OF THE UNITED STATES.

No. 301.

THE FIRST NATIONAL BANK OF LOUISVILLE, PLAINTIFF IN ERROR,

VS.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 UNITED STATES OF AMERICA, *District of Kentucky, ss*:

The President of the United States of America to the judges of the Court of Appeals of the State of Kentucky, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you between the Commonwealth of Kentucky, plaintiff, and the First National Bank of Louisville, defendant, a manifest error hath happened, to the great damage of said First National Bank of Louisville, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded. if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next December term in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this twenty-first day of October, A. D. 1868, and of the independence of the United States the ninety-third.

[SEAL.] A. J. BALLARD, *C. C. C. K. D.*

2 UNITED STATES OF AMERICA, *District of Kentucky, ss:*

To the Commonwealth of Kentucky, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in and on the seventh day of December next, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein the First National Bank of Louisville is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus K. Williams, chief justice of the Appellate Court of the State of Kentucky, this twenty-second day of October, in the year of our Lord 1868, and of our independence the ninety-second.

R. K. WILLIAMS,
Chief Justice Appellate Court of the State of Kentucky.

I accept service of the within.
Oct. 27th, 1868.

JNO. ROBINSON,
Atto. General Ky.

I accept service of the within.
October 31st, 1868.
[SEAL.]

J. W. STEVENSON,
Gov. of Ky.

3 Court of Appeals, State of Kentucky.

At a Court of Appeals for the State of Kentucky, held at the capitol in Frankfort, on the 8th day of October, 1868, present, Williams, chief justice, Robertson, Hardin and Peters, judges.

Be it remembered, that heretofore, to wit, on the 25th day of March, 1867, the following transcript of record from the Franklin Circuit Court was filed in the clerk's office of this court:

Franklin Circuit Court, State of Kentucky.

Proceedings before the Hon. George C. Drane, judge of the Franklin Circuit Court, at the court-house in Frankfort, on the 20th day of Oct., 1866.

THE COMMONWEALTH OF KENTUCKY, pl'ff,
against
THE FIRST NATIONAL BANK OF LOUISVILLE, defendant.

4 Be it remembered, that on the 13th day of Sept'r, 1866, the attorney general filed in the clerk's office of the court aforesaid the following petition:

Franklin Circuit Court.

Petition.

THE COMMONWEALTH OF KY., plaintiff,
against
THE FIRST NATIONAL BANK OF LOUISVILLE, defendant. } Petition.

The plaintiff, the Commonwealth of Kentucky, state that the defendant, the First National Bank of Louisville, is a moneyed corporation of loan and discount and a banking association, organized under an act of Congress of the United States approved June 3, 1864, entitled An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, and other laws of said Congress. Said banking association was organized and in operation within this State, at the city of Louisville, previous to the 1st Monday in July, 1864, and has been ever since, and is now, in operation, doing banking business in this State under said name and style.

The capital stock of said bank, on the 1st Monday in July, 1864, was $200,000 00; two hundred thousand dollars, or 2,000
5 shares of $100 00 each. Its capital stock, on the first Monday in July, 1865, was $300,000, or 300 shares, at $100 each. Its capital stock, on the 1st Monday in July, 1866, was $300,000; three hundred thousand dollars, or 300 shares, at $100 00.

Plaintiff states that by the laws of the Commonwealth it was the duty of the def't, by its officers, to pay into the treasury of the pl'ff, on the 1st Monday in July, 1864, and annually on the same day in each year thereafter, a tax of 50c. on each share of stock in said bank, equal to $100 of its capital stock, or on each $100 of stock therein, owned by individuals, corporations or societies. Pl'ff avers that the defendant did not on the 1st Monday in July, 1864, nor has it at any time paid any tax or money whatever into the public treasury of pl'ff on account of the capital stock or shares held therein. The amount due plaintiff from defendant, and payable by defendant into the public treasury on the first Monday in July, 1864, was $1,000; on the first Monday in July, 1865, $1,500, and on the first Monday in July, 1866,
6 $1,500; and pl'ff is entitled to judgment against the defendant for each of said sums with interest from the dates when they were respectively due as aforesaid, as set out in pl'ff account herewith filed, showing the particulars of her demand; and plaintiff prays judgment for said sums with said interest, and all proper relief.

JOHN M. HARLAN,
Attorney Gen'l.

W. T. Samuels, auditor of public accounts, says he believes the statements of the petition to be true.

W. T. SAMUELS, *Auditor.*

Sworn to before me by W. T. Samuels, this September 13, 1866.

W. FRANKLIN,
C. F. C. C.

Account.

The following is the account filed with the foregoing petition:

The First National Bank of Louisville
To the Commonwealth of Kentucky.

To this amount of tax on $200,000 of capital stock or 200 shares of $100 each, held on first Monday in July, 1864, @ 50 cts. on $100, $1,000, interest from 1st Monday in July, 1864.

To this amount of tax on $300,000 of capital stock, or 300
7 shares each, of $100 each, held on 1st Monday in July, 1865, at 50 c. on $100, $2,000 interest from first Monday in July, 1865.

To this amount of tax on $300,000 of capital stock, or 300 shares of $100 each, held on the 1st Monday in July. 1866, @ 50 c. on $100, $2,000, interest from 1st Monday in July, 1866.

On the 13th day of September, 1866, the following summons issued:

Summons.

The Commonwealth of Kentucky to the sheriff of Jefferson county, greeting:

We command you to summon the First National Bank of Louisville to answer, on the 1st day of the next Octo. term of the Franklin Circuit Court, a petition filed against them in said court by the Commonwealth of Kentucky, and warn them that upon failure to answer the petition it will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on 1st day of the next October term of said court.

Witness Walter Franklin, clerk of the Franklin Circuit Court, this 13th day of September, 1866.

W. FRANKLIN, *C. F. C. C.*

8 *Return.*

Executed on George A. Lewis, president of the 1st National Bank of Louisville, Sept'r 14th, 1866, by delivering him a copy of this summons.

W. A. RONALD, *F. C.*

Answer filed.

At a court held as aforesaid, on the 8th day of October, 1866, the defendants appeared by their attorney and filed their answer.

Franklin Circuit Court.

Answer.

THE COMMONWEALTH OF KY., plaintiff, *against* THE FIRST NATIONAL BANK OF LOUISville, defendant. } Answer.

The defendant, the 1st National Bank of Louisville, come and defend, and for answer to plff's petition say they ought not to be compelled to pay the sums charged in pl'ff's petition as due, to wit: $1,000 as of the first Monday in July, 1864; $1,500 as of the first Monday in July, 1865; and $1,500 as of the first Monday in July, 1866, or any part of said sums, because they say—

First. That the First National Bank of Louisville, defendants herein,
9 is not a moneyed corporation of loan and discount or banking association, either organized or existing under any law of the State of Kentucky, nor does it derive any of its rights, franchises or power from said State or any law thereof; but defendant says it is a banking association or ganised under an act ap-

proved Feb'y 25, 1863, existing under an act of the Congress of the United States approved June 3, 1864, entitled An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, and other laws of said Congress. Defendant says it has organised under said act of Congress, and is now and was prior to the 1st Monday in July, 1864, operating under the same. Defendant says that under said law of Congress there is no authority for the taxation on pl'ff's petition claimed, or any part thereof.

2nd. This defendant says that under and by virtue of said act of Congress, in such cases made and provided, the Secretary of the Treasury of the United States has designated this defendant as a government depository and a financial agent of the United States;
10 that it is now, has been, and was prior to the 1st Monday in July, 1864, acting as such financial agent of the government of the United States within the city of Louisville and State of Kentucky; that as such financial agent, created for the purpose of more effectively carrying on the fiscal business of the United States, the plaintiff cannot require of this defendant any tax whatever, either on the bank, its capital or its shares.

3rd. This defendant says its entire capital stock is invested in bonds, and of the government of the United States, issued under the act of Congress of Feb. 23rd, 1862, and subsequent acts of the Congress of the United States; that its present capital and shares consists of and represent three hundred thousand dollars of government bonds and securities; that its shares of stock represent but one interest in said bonds, and that any taxation of either the bank, its capital, or shares is in conflict with the act of Congress in such cases made and provided, and with the Constitution of the United States.

4th. This defendant says that it denies that it was the
11 duty of defendant or its officers to pay unto the treasusy of plaintiff, on the 1st Monday in July, 1864, and annually on the same day in each year thereafter, a tax of 50 c. on each share of stock of defendants, equal to $100 of its capital stock, or on each $100 of its stock therein owned by individuals, corporations or societies, in manner and form in pl'ff's petition set up, or in any other manner and form, or that it was and is the duty of this defendant to pay any sum whatever. This defendant says that the shares of its capital stock are the property of the individual shareholders; that it has no ownership or property on them. In fact this defendant is by law forbidden to own or hold any share of its stock. Defendant says that all times it has exhibited for the benefit of auditors and assessors, and other properly authorized officers of pl'ff, a full and complete list of her shareholders; the number of their shares and their value, which list can always be seen. She says she has no authority or right to pay taxes for her shareholders, nor ought she to be compelled so to do. Now, having fully answered, this defendant prays to be dismissed.

GEO. W. CARUTH, *Att'y.*

12 George A. Lewis says he is the president of the 1st National Bank of Louisville, and that the foregoing allegations are true.

GEO. A. LEWIS, *President.*

Subscribed and sworn to before me this 4th day of Oct., 1866.

GEO. W. CARUTH,
Not'y Pub. Jeff Co.

Demurrer filed.

At the same court, continued and held on the 16th day of Oct., 1866, the pl'ff filed a demurrer to def't's answer.

Franklin Circuit Court.

Demurrer to answer.

COMMONWEALTH
vs.
FIRST NAT'L BANK. } Demurrer.

The plaintiff demurs to the answer of defendant upon the ground that it does not state facts sufficient to constitute a defense to this action.

JOHN M. HARLAN,
Attorney Genl.

Judg't.

At the same court, continued and held on the 20th day of Oct., 1866—

The court being sufficiently advised of an concering pl'ff's demurrer to defendant's answer, is of opinion that said answer is
13 insufficient, and that said demurrer be sustained. The pl'ff saying nothing further, but standing by his demurrer, it is adjudged and ordered that the pl'ff's petition be dismissed; to all which pl'ff by her att'y excepts, and prays an appeal to the Court of Appeals, which is granted.

Kentucky Franklin Circuit C't.

Appeal granted.

I, W. Franklin, clerk of the court af's'd, do certify that the foregoing nine pages and the above lines contain a full, true and complete transcript from the record and proceedings had in the cause therein mentioned.

Witness my hand this 19th day of December, 1866.

W. FRANKLIN, *C. F. C. C.*

And afterwards, to wit, on the 17th December, 1867, the following order was entered herein:

COMMONWEALTH
v.
FIRST NATIONAL BANK FRANKLIN.

Came parties herein by counsel, and by consent this cause is set for hearing on the 15th day of January, 1868.

And afterwards, to wit, on the 14th Jan'y, 1868, the following order was entered herein:

14 COMMONWEALTH
vs.
FIRST NATIONAL BANK FRANKLIN.

Came parties herein by counsel, and by consent this cause is set for hearing on the 28th January, 1868.

And afterwards, to wit, on the 1st June, 1868, the following order was entered herein:

COMMONWEALTH
vs.
FIRST NATIONAL BANK FRANKLIN.

This cause came on, and was heard, but the court not being fully advised, took time.

And afterwards, to wit, on the 8th Octo., 1868, the court directed that the following order be entered herein.

Appeal from a judgment of the Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, appellant,
against
FIRST NATIONAL BANK OF LOUISVILLE, appellee.

The court being sufficiently advised, it seems to them that the judgment herein is erroneous,

It is therefore considered that the judgment of the Circuit Court dismissing the petition be reversed, with directions for further proceedings to assess the shares in said First National Bank at fifty
15 cents for each share of $100, and to adjudge the amount against the proper officers, as provided in our State enactment.

Which is ordered to be certified to said court.

And on same day, 8 Oct'r, 1868, delivered the following opinion herein, viz:

COMMONWEALTH OF KENTUCKY
vs.
THE FIRST NATIONAL BANK OF LOUISVILLE.

This wasa suit by the Commonwealth to compel the defendant to pay into the revenue of the State fifty cents on the share of stock

therein, as required by the act of assembly of February 9, 1865, Myers' Supplement to Revised Statutes, 482, and which is as follows:

SEC. 1. That it shall be the duty of the officers or managers of the banking associations which have or may hereafter be established within this State, under the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," to file with the auditor of public accounts a statement, verified by affidavit of the presiding officer or cashier of the association,
16 showing the amount of capital stock, and the number of shares into which the same may be divided, and it shall be the duty of such officers or managers, annually, on the first Monday in July, to pay into the public treasury of the State, in aid of the sinking fund, a tax of fifty cents on each share thereof, equal to one hundred dollars of the capital stock of said association: Provided, however, That if the capital stock shall at any time be increased or diminished, it shall be the duty of such association to revise and amend the statement required by this act, so as to exhibit at all times the true amount of capital stock held by such association.

The only other State statute applying to this controversy is chap. 83, 2 Rev. Stat., sec. 1, art. 2, p. 239, as follows:

"*Specific taxation on real and personal estate.*

"On bank stock, or stock in any monied corporation or loan or discount fifty cents on each share thereof, equal to one hundred dollars of stock therein owned by individuals, corporations, or societies."

And article 10 of said chap. 2 Rev. Stat., 266, as follows:

"*Payment of revenue by banks and other corporations into the treasury.*

17 "SEC. 1. The cashier of a bank and the treasurer of any other institution whose stock is taxed shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his securities shall be liable for the same and twenty per cent. upon the amount, and the said bank or corporation shall thereby forfeit the privileges of its charter."

No bank or stockholder in the State pays less than fifty cents on each share of $100 in the capital stock of a bank, by either a general or special statute.

There is then no question of inequality of this attempted taxation of shares in the national banks and the State banks; no discrimination against shareholders in the national banks and in favor of shareholders in the State banks, but the former stands upon an exact footing of the most favored of the latter. The only question then is this mode of taxation contrary to the first and second provisions of

sec. 41 of the congressional act of June 3, 1864, chap. CVI, entitled "An act to provide a national currency, &c., as follows :

"Provided, That nothing in this act shall be construed to
18 prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where located, and not elsewhere, but not at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State: Provided, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

As was said by the United States Supreme Court in Van Allen vs. The Assessors, 3 Wallace, 584, "the tax on the shares is not a tax on the capital of the bank." And "that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limits prescribed by the act authorizing their organization."

Nothing can therefore be clearer than that the shareholders
19 in these national banks, located in this State, can be made to pay the same tax that shareholders in the banks authorized by the State laws are compelled to pay, to wit, fifty cents on each share of $100. Now this State statute does not tax the capital of the banks but the shares of $100—and whether these shares be worth fifty dollars or two hundred dollars each matters not, because all shares of $100, in every bank of the State, is taxed the same, regardless of their marketable value, and there is here, as elsewhere, a great difference in the value of shares or stock in our different State banks, some being worth largely more than others, and so it is with the national banks; still all are required to pay and be alike assessed.

As the tax is laid upon the shares and not upon the capital of the bank, it is really and bona fidely a tax upon the shareholders, but as many of these are non-residents and could not be reached by the laying taxes upon their shares or stock, and looking alone to them for payment, the State laws required the cashier of the banks to pay this tax upon their shareholders. If there be any provision
20 of the congressional enactment authorizing these associations to prevent the State requiring of the officers of the association to pay the tax levied upon its shareholders, it has not been pointed out or seen by us. The great, if not sole, object of Congress was to secure the national bank associations from a discriminating tax, and not that the tax should be collected in a particular manner. If, therefore, the State should only tax shareholders of these associations the same as shareholders in their own banks, the mode of obtaining payment was not regarded material, and especially should this not be the case where not only the tax but the mode of obtaining it is precisely the same as it is in this case, for the State

requires of the officers of her State institutions to pay the tax due by their respective shareholders.

In the case of Van Allen vs. The Assessors, the Supreme Court of the United States reversed the judgment of the Appellate Court of New York, sustaining the right to tax the shares in the national banks under the State statute of New York of March 9, 1865, because said statute provided that such shares should be taxed as personal property, and did not provide they should only be taxed at the same rates that shares in the State banks were; but on the
21 contrary it appeared that shares in the New York State banks were not taxed at all, because the capital of such banks were taxed.

So in Bradley et als. vs. Illinois, decided by the Supreme Court of the United States, in 1867, reversing the decision of the Supreme Court of Illinois, holding shares in national banks taxable under the Illinois statute of February 14, 1857, which did not tax the shares but the capital of her State banks, together with the surplus profits and reserved funds.

In the case of New York ex rel. D. Duer vs. The Commissioners of Taxes for the City and County of New York; and the same ex rel. R. Mead vs. The Same. The Supreme Court of the U. S. affirmed the judgment of the Appellate Court of New York, sustaining a tax on the shares in the national banks without deducting therefrom the amount of the capital invested in the U. States bonds not taxable under State authority, because it held these were only attempted to be taxed as other personal property was taxed under the laws of New York, and not more than was assessed upon shares of States banks.

And in Wright, auditor, and Meyer, treasurer of Marion
22 county vs. Stelz, the Supreme Court of Indiana held that no tax could be levied on the shares in the national banks under the Indiana statute, for, to use their own language, "the plain reason that no such tax is imposed on the shares of any banks organized under the authority of the State," as "we tax our own banks upon their paid-in capital, and do not tax the shareholders thereof upon the value of their shares." Laws of 1861, p. 17.

And in Frazer vs. Silberne et als. the Supreme Court of Ohio held that the shares in national banks could not be assessed under the statute of that State, because it did not provide for a deduction of the capital invested in government bonds not subject to State taxation, whilst such deduction was made as to the State banks, and which were taxed upon their capital.

Thus it will be seen that no adjudication of the either the Supreme Court of the United States or any State, has as yet decided that where a State taxes the shares and not the capital of her own banks, and then looks to the officers of the bank to pay this tax instead of pursueing each individual stockholder, that the same tax, to be collected the same way, may not be assessed upon the shares in
23 the national banks. In Louisville Savings Bank, &c., vs. Commonwealth, 14 B. Mon. 409, this court held that notwithstanding there was no specific clause in the charter of the appellant

requires of the officers of her State institutions to pay the tax due by their respective shareholders.

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21 contrary it appeared that shares in the New York State banks were not taxed at all, because the capital of such banks were taxed.

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23 the national banks. In Louisville Savings Bank, &c., vs. Commonwealth, 14 B. Mon. 409, this court held that notwithstanding there was no specific clause in the charter of the appellant

providing for a tax of fifty cents on each share of $100—as was the case in all the banks of circulation—that still the officer was liable to pay the fifty cents on each share as provided in sec. 1, art. 2, and in sec. 1, art. 10, chap. 83, Revised Statutes, before quoted. This tax of fifty cents on the share is the least and only tax assessed upon the shares or shareholders of our State banks, and the banks' officers are required to pay this for their shareholders. This policy is obviously both reasonable and convenient; it is but reasonable and fair that the State should have this tax from the non-resident as well as resident shareholders in associations which exist by her laws, and have franchises peculiarly beneficial and exclusive conferred by her authority. What other convenient and certain mode of getting this from the non-resident shareholders, but by making it the duty of the officer of the institution to pay for its stockholders? But it is convenient
24 even if all the stockholders were residents, for then these would be scattered through the various counties of the State, as the certificates of stock are transferable. When the State shall only tax shares in the national banks at the same rates and shall collect the tax by the same means as applicable to the State banks, every substantial requirement of the national bank act of Congress has been complied with.

To suppose that Congress intended that the States should exercise this sovereign power, as to taxing shares in national banks, that they by their State laws exercise as to their own banks shareholders, and then to quibble about the means of collecting the tax, is beneath the dignity of the question and the high source of the enacting power.

When the wants of the governments, both State and national, were limited, their revenues abundant, though derived from but few sources, and taxes comparatively light, these revenue laws were not so closely scanned, but now that taxes are enormous, the demands great, and resources not adequate thereto, monied institutions
25 and capitalist, ever Argus eyed, are searching for every pretext to escape the public burdens; but as they are permitted to shove these from their shoulders they become proportionately heavier upon the producing and humbler classes, and do them an enormous injustice; hence courts, neither federal nor State, should lend a too listening ear to their clamor to escape a reasonable and just proportion of the taxes so essential to liquidate both State and national obligations.

Believing that our State laws, so far from conflicting with the congressional enactment, are in strict harmony with it, and that the shares in the national banks are legally liable to a tax of fifty cents on each of $100, and that bank officers can be legally compelled to pay these taxes for their respective shareholders, the judgment of the Circuit Court dismissing the petition is reversed, with directions for further proceedings to assess the shares in said First National Bank at fifty cents for each share of $100, and to adjudge the amount against the proper officers, as provided in our State enactment.

26 It would be wholly foreign from the objects of Congress to attempt to enact by what means the States should collect its taxes.

STATE OF KENTUCKY, *Court of Appeals*:

I, Alvin Duvall, clerk of the Court of Appeals for the State of Kentucky, do certify that the foregoing twenty-three pages and the above lines contain a full, true and complete transcript from the record and proceedings had in the cause therein mentioned.

Witness my hand and the seal of my office this 10th day of November, 1868.

[SEAL.] A, DUVALL, *Cl'k Ct. App.*

Endorsed: First National Bank of Louisville vs. Commonwealth; Transcript. Fee, $7 00. Franklin.

27 *Assignment of errors.*

THE FIRST NATIONAL BANK OF LOUISVILLE, pl'ff in error,
vs.
THE COMMONWEALTH OF KENTUCKY, def't in error.

The pl'ff in error, the First National Bank of Louisville, by way of assignment of errors in the above and foregoing record, says:

1. The judgment of the court in said cause is repugnant to the Constitution of the United States, and is in conflict with the act of Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," of June 3d, 1864.

28 2. The act of the general assembly of "revenue and taxation," section 1, article 2 and article 10, and the act of the general assembly of Kentucky of February 19th, 1865, entitled "An act increasing the resources of the sinking fund, and upon which the judgment herein against the First National Bank is based, are repugnant to the Constitution of the United States and the act of the Congress of the United States of June 3d, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof."

Which manifest errors the First National Bank of Louisville, plaintiff in error, ask to be corrected, and that the judgment of the Court of Appeals herein and above set out be reversed, and that full and speedy justice may be done.

PIRTLE & CARUTH,
Att'ys for Pl'ff in Error.

IN THE SUPREME COURT

OF THE UNITED STATES.

FIRST NATIONAL BANK OF LOUISVILLE
vs.
THE COMMONWEALTH OF KENTUCKY.
No. 301.

ERROR TO COURT OF APPEALS OF KENTUCKY.

Argument for Defendant in Error.

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel.

Supreme Court of the United States.

FIRST NATIONAL BANK OF LOUISVILLE

vs.

COMMONWEALTH OF KENTUCKY.

Argument for Defendant in Error.

By the general statutes of Kentucky, a specified tax is levied, of fifty cents on every share, equal to one hundred dollars, of bank stock, or stock in any moneyed corporation of loan or discount, or on each one hundred dollars of stock therein, by whomsoever owned.—*Rev. Stat., ch.* 83, *art. ii*, § 1. *Auditor's Dig.*, 1868, *p.* 75.

And the cashier of every bank, and the treasurer of every other institution whose stock is taxed, is required to pay into the treasury of the State, on the 1st of July in each year, the amount of tax due by such bank or institution; failing to do which, he and his sureties are to be liable for the same, with twenty per centum added to the amount.—2 *Rev. Stat., ch.* 83, *art. x*, § 1, *and Dig.* 99.

Upon such failure, also, it is provided, the bank or corporation forfeits the privilege of its charter.—*Ib.*

These provisions of the statutes have been in force for many years.

By a statute of February 9, 1865, it is also provided as follows:

"§ 1. That it shall be the duty of the officers or managers of the banking associations which have or may hereafter be established within this State, under the act of Congress, entitled 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' to file with the Auditor of

Public Accounts a statement, verified by the affidavit of the presiding officer or cashier of the association, showing the amount of its capital stock, and the number of shares into which the same may be divided; and it shall be the duty of such officers or managers, annually, on the first Monday in July, to pay into the public treasury of the State, in aid of the Sinking Fund, a tax of fifty cents on each share thereof, equal to one hundred dollars of the capital stock of said association: *Provided, however*, That if the capital stock shall at any time be increased or diminished, it shall be the duty of such association to revise and amend the statement required by this act, so as to exhibit at all times the true amount of capital stock held by such association."—*Stanton's Suppl., p.* 482.

In September, 1866, the Commonwealth of Kentucky filed in the Franklin Circuit Court a petition against the First National Bank of Louisville.

The petition contained the following allegations:

That the defendant was "a moneyed corporation of loan and discount, and a banking association," organized under the act of Congress of June 3, 1864, and other statutes of the United States; and that it was organized and in operation within the State of Kentucky, at Louisville, previous to the 1st Monday of July, 1864, and ever since had been, and then was, in operation, doing banking business in that State under the name and style aforesaid;

That its capital stock was, on the first Monday of July, 1864, 2,000 shares of $100 each, or $200,000; on the first Monday of July, 1865, 3,000 shares, or $300,000; and the same on the first Monday of July, 1866.

That it was the duty of the bank, by its officers, under the laws of the State, to pay into the Treasury on each of those days a tax of fifty cents on each share of the stock, by whomsoever owned; no part of which had been paid.

That the amount so payable in 1864 was $1,000; in 1865, $1,500; and in 1866, $1,500.

And the Commonwealth demanded judgment for these sums, with interest, in cash, from the date when it should have been paid.

The tax claimed as due in 1864 was demanded under the old law; and the other amounts under the statute of 1865.

The bank answered, by way of defence:

First: That it was not organized under any law of the State, nor derived from the State any of its rights, franchises

or powers; but was organized under the act of Congress of 1864; and that under that act the taxes claimed were unauthorized.

Second: That under the act of Congress the Secretary of the Treasury had designated it as a government depositary and financial agent of the United States; and that it had been acting as such prior to the first Monday of July, 1864, and thence until the time of answering, in Louisville; and as such financial agent could not be taxed by the State, "either on the bank, its capital, or its shares."

Third: That its whole capital stock was invested in bonds and securities of the United States; such capital and shares consisting of and representing $300,000 of such bonds and securities; that its shares of stock represented but one interest in the bonds, and any taxation by the State of the bank, its capital or shares, was in conflict with the act of Congress and the Constitution of the United States.

Fourth: That it was not the duty of the bank or its officers to pay the taxes demanded into the Treasury; that the shares of stock are the property of the individual shareholders, it having no ownership or property in them, and being in fact forbidden to own or hold any share of its stock; that it has always furnished the proper officers of the State with lists of the stockholders, and of the number and value of their shares; and that the bank has no authority or right to pay taxes for its shareholders, and ought not to be compelled to do so.

Demurrer to this answer was overruled, and the Commonwealth abiding by its demurrer, judgment of dismissal of the petition was rendered, and the State appealed to the Court of Appeals, where the judgment below was reversed, with directions for further proceedings to assess the taxes demanded, "and to adjudge the amount against the proper officers," in accordance with the statutes of the State.

The act of 1864 authorizes the formation of "associations for carrying on the business of banking." Every such association is declared to be a body corporate, to have succession for twenty years, with the franchises and powers of a banking corporation.

The capital stock of each is to be divided into shares of $100 each, and these are declared to be personal property; and the shareholders are individually responsible, equally

and rateably, and not one for another, for all contracts, debts, and engagements of the association, to the extent of the amount of their stock in it, at its par value, in addition to the amount invested in the shares.

The whole capital stock is required to be paid in by instalments; and the association is required to deposit with the Treasurer of the United States bonds of the United States to the amount of one-third of its stock paid in, receiving in return circulating notes to a certain amount per centum of the par value of the bonds deposited. These notes, so signed as to become notes of the association, are receivable at par by the United States in payment of all dues except duties on imports, and for all salaries, debts, and demands due by the United States, except interest on the public debt and in redemption of the national currency.

It is provided that these associations shall be, when designated for that purpose by the Secretary of the Treasury, depositaries of public money, and may also be employed as financial agents of the government, performing all such reasonable duties, as such depositaries and agents, as may be required of them.

The provisions in regard to taxation of the stock or shares of such banks are: that lists shall always be kept of the names and residences of all shareholders, and the number of shares held by each, subject to the inspection of the officers authorized to assess taxes under State authority.

"In lieu of all existing taxes," each association is to pay certain amounts to the United States, upon its notes in circulation, its deposits, and the amount of its capital stock not invested in United States bonds.

"*Provided*," the act continues, "that nothing in this act shall be construed to prevent *all the shares* in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority *in the place where such bank is located*, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided, however*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

The learned counsel for the bank agree "that *rights* conferred and *franchises* derived through State legislatures are unquestionably the subjects of State taxation;" and they say that this test of the taxing power is as unerring as it is just; that taxation is a *price*—a price paid for rights conferred and protection enforced; an attribute of sovereignty, and the sovereign alone can demand it. And on the latter point they quote the language of MARSHALL, Ch. J., in *McCulloch* v. *Maryland*, that "if we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied."

In *The People* v. *Commrs. of Taxes*, 30 *New York*, 430, it was held that the owners of stocks of the United States, employing them in banking in a State, were *rightfully* made taxable by State authority, at the place where the business of banking was transacted; *because*, the Court said, such property enjoys the protection of the laws and institutions of the State where it is so employed, and ought to contribute to the support of the government that protects it.

It is a novel idea that, because a banking association for private profit is incorporated by the United States, it is not protected in its operations and business by the laws and institutions of the State in which it transacts its business. What reason can be imagined why it is not as much protected by them as if it were chartered by another *State*? The charter merely gives it its corporate existence. It is the continuance of that existence only which is secured to it by the exercise of the sovereign powers of the United States. So brought into existence, it stands on no higher ground, and is no more independent of the protection of the laws of the State, in conducting its business, than any other corporation, an individual.

In *Providence Bank* v. *Billings*, 4 *Peters*, 563, the Court said: "The power of legislation, and consequently of taxation, operates on all the prsons and property belonging to the body politic. * * * It resides in government as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies." The cases of *McCulloch* v. *Maryland*, and *Osborn* v. *Bank of United States*, the Court said, both "proceeded on the admission that an incorporated bank, unless its charter shall express the exception, is no more

exempted from taxation than an unincorporated company would be, carrying on the same business."

In *Dobbins* v. *Commissioners of Erie County*, 16 *Peters*, 447, the Court said that "taxation was a sacred right, essential to the existence of government, and an incident of sovereignty; and that the right of legislation was coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But this power in a State is restrained by constitutional prohibition necessarily implied, when the exercise of a right by it conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers."

In *Nathan* v. *Louisiana*, 8 *Howard*, 73, the Court said: "The taxing power of a State is one of the attributes of its sovereignty, and where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the *property* and *business* within the State which are not properly denominated the means of the general government. * * Whatever exists within its territorial limits, in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation; and there is no Federal power under the Constitution which can impair this exercise of State sovereignty."

In *Philadelphia and Wilmington Railroad Company* v. *Maryland*, 10 *Howard*, 393, the Court said: "There is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of the necessary public burthens, as well as the property of individuals."

Nevertheless, upon the authority of *McCulloch* v. *Maryland*, it is contended that, as the Bank in question is a creature of the United States, deriving its corporate capacity, rights, franchises and powers from the Federal Government, is independent of the State, asks no State protection, needs none, and is complete as a part of the fiscal machinery of the Federal Government, the power of taxation, in cases like this, must be derived from the national sovereignty.

This power, it is said, has to a certain extent been *con-*

ferred on the States, and to be made available must be strictly and literally followed.

The act of 1864 does not undertake or purport to *confer* any power of taxation on the States. After providing for certain duties to be paid to *the United States* by the associations in question "*in lieu of all existing taxes*," and lest this *should* be construed to mean that no power of taxation of capital stock or shares should remain in the States, it declared that nothing in it should be construed to prevent all the shares of stock from being included in the valuation of the personal property of the shareholders, in the assessment of taxes under State authority. This is not to *confer* power on the States, but to disclaim any intention of taking such power away. Whether it implies a prohibition against the exercise of the conceded power of taxing the shares of stock as personal property, in any *other* way or manner than by including it in the valuation of the personal property of the shareholders, is another question to be considered hereafter; and in considering it, it is to be noted that however the tax is to be imposed, it can be done only "*at the place where such bank is located, and not elsewhere.*"

In *The People* v. *Bradley*, 39 *Illin.*, 130, the Court held that the power of taxation by the States was not derived from, nor does it depend upon the Federal Government, and may be exercised without limit upon all persons and property within the State, except so far as it is restricted by the Federal Constitution.

And, that the Federal Constitution, by implication, limits the power of taxation by a State, as to those instruments employed by the General Government to carry out its authority, and the operation of those instruments; but it in nowise prohibits the taxation of the *property* of those instruments. Thus, the bonds of the United States cannot be taxed, being instruments used in aid of the authority of the Federal Government; but when converted into bank stock, such stock becomes the property of those instruments, and represents the interest of the particular shareholder owning such stock, and *is* subject to taxation by the State. The shares of stock held by a person in the capital stock of a National Bank, constitute his interest in the bank, and such interest is liable to assessment and taxation under the laws of the State. It is a subject over which the sovereign power of the State extends, and this power exists by virtue of au-

thority inherent in the State itself, and cannot be directed or controlled in its exercise by the General Government.

The Court declared the provision in the act of Congress creating National Banks to be "simply nugatory and inoperative," which, it is insisted by learned counsel in this case, is permissive, a *grant* of authority to tax, a *delegation* of the right to tax. The Court said, "If the right were conceded to the General Government to limit or control taxation in the States, it would involve the power to prohibit their collection; and the power to prohibit involves the authority to render the power to raise the revenue necessary for the support of the State government useless, if not impossible.

A corporation is but a limited and peculiar *partnership* of individuals, with perhaps unequal interests, and limited and proportionate responsibilities, and regarded by law as one person or a unit, acting, contracting, and dealing under an individual name. The corporation is regarded as a *person* in law, different and distinct from all the persons composing it, its property, debts, and contracts not theirs, so that all may, as a unit, sue or contract with any one or more of themselves. The case is the same with a corporation sole. The single individual invested with corporate powers is deemed a person in law different and distinct from himself, and capable of suing and contracting with himself.

This person in law may owe its existence and the possession of its franchises and capacities to one sovereignty, and still be, when domiciled within the domain of another sovereignty, subject to that sovereignty in very many and very important respects. It may be created and derive its unity and corporate existence and franchises from the legislative power of one State, and exercise its capacities and franchises, be domiciled in and carry on its business in another. If created by the superior and paramount authority of the United States, exercised within the Constitution, the sovereignty of the State within which it may be domiciled cannot interfere with any powers or franchises, or annul any exemptions created by the paramount sovereignty.

But it is also true that for many purposes, and completely so in reality, the corporation and its stockholders are the same, its property, profits, and losses, debts and contracts, obligations and liabilities, theirs. It is simply themselves, exercising jointly, by certain officers and agents, and as a unit, certain powers and faculties, and subject to certain limited responsibilities.

In declaring the shares of stock of the associations in question to be personal property, the act of Congress simply declared what was already the law as to the stock of all corporations. It is property, and not being or savouring of realty, it is of course personalty, and the property of the individual shareholders, and therefore subject to State taxation as such. It could not, we imagine, *as* their property, be by the national authority exempted from State taxation. At all events, all intention to exempt it as such is disclaimed.

If, or so far as, the stockholders in a national bank are citizens of the State in which the bank is domiciled, they simply invest in a particular manner, within the State, a certain amount of their means, instead of continuing to hold the same individually, or investing it in a partnership. The sovereignty of the State extends over all individuals and their property within its limits. If the individual is a corporation domiciled in the State, the State sovereignty is complete over it, except so far as its exercise would conflict with the paramount sovereignty of the nation. The sovereignty that governs the inhabitant, the person or corporation domiciled within the limits of its dominion, may be very different from the sovereignty that creates the person or the corporation, and from which the attributes and faculties of the corporation are derived. From the former no number of the citizens can withdraw themselves, by becoming a fictitious unit by means of the exercise of the higher sovereignty except so far as that higher sovereignty has the power and exercises the power to make them, as a unit, independent of the sovereignty to which in all other things they are subject. It does not even need that this immediate and subordinate governing power should in any respect be sovereign, inasmuch as the same power of governing persons and corporations domiciled within its limits, and causing them to contribute to the common burthens, exists in a city or a town.

If all or part of the stockholders are citizens and residents of States or countries other than that in which such an association is domiciled, they nevertheless deal and traffic there, as a corporation, and own their stock there, using the officers and agents of the bank as their agents, in possession of the means with which they deal. It may very well be that a large part, or even all, of the stockholders of such a bank in Kentucky may reside in other States, or even in a foreign country. The stock, also, though transferable only on the books of the bank, may yet pass by an equitable transfer,

good as against third persons; (*Black* v. *Zacharie*, 3 *Howard*, 483;) and will pass absolutely by a sale under legal process; so that it may be quite impossible to know at any given time to whom much of the stock really belongs, or where the holders reside. And even if the lists required by the law to be kept *should* show the names and residences of all the actual owners of the stock, it would be of no avail to the State or its assessing officers, as to all stockholders not residing within the State, unless, when it has been included in the valuation of the personal property of such non-resident stockholders, the tax upon it, which the State is authorized to collect, can be collected, either by sale of the stock itself, or by compulsory measures taken against whomsoever may be the agent or agents of such non-resident stockholders.

The Association in question was domiciled in Kentucky, wherever its stockholders resided. There were their funds and property, in the hands of the bank and its officers, as their agents. The individual created by law, and so domiciled, would itself be subject to taxation by the State as a natural person would, if to tax it would not have been contrary to the Constitution of the United States, or to the act of Congress. It is not possible that both the corporation and its stockholders should be exempt from State taxation, upon that which is no more than ordinary personalty, declared to be such by the act of Congress. That the capital stock cannot be taxed as the property of the corporation, if it be so, proves that the shares *are* liable to taxation as the property of the shareholders.

There is no possibility of taxing these shares elsewhere. They can only be taxed, by the express letter of the law, in the State of the domicil of the bank; and the claim that the bank cannot be required to pay the taxes for its shareholders, is really a claim that this large amount of personalty is to a great extent exempt from State taxation altogether. If the shareholders cannot avoid paying it, it is of little importance to them by what agency they are required to pay.

There is no question here of *taxing* "rights conferred by, and *franchises* derived through, State legislation." It is *property* that is taxed here, like all other property in the same State, and not rights or franchises; and whether the property of citizen or foreigner, it is entitled to no exemption. The owner, if resident in another State, cannot be taxed for it *there*. The act of Congress treats it as person-

alty existent only in the State wherein the bank is established. If taxation *is* "a *price*, paid for rights conferred and protection enforced," it is also the mode by which all property is made to share the common burthens of the common government. The National Banks are created, it is true, by the National Government, and from it derive their capacities and franchises. They might "*exist* independent of the State," but they are not independent of it in any other sense. Their contracts are enforceable in the State Courts, protected by the State laws, governed and modified by those laws, like all other contracts. The laws and government of the State do extend their protection over these Associations, as over all other persons and corporations. The *people* of Kentucky are created by the Deity, whose power is even greater than that of the United States. He confers on them their faculties and capacities; but they are, nevertheless, subject to the sovereignty and power of government of the State.

If part or even all the shareholders in these Associations can avoid bearing any part of the burthens of the State; if there is no mode by which their stock can be taxed when they are non-residents, how would the principle laid down by Marshall, Ch. J., "leave the power of taxing the people and property of a State unimpaired, and leave to a State the command of *all* its resources"?

And if the principle be sound, that a State can have no just right to tax the shares of capital stock of a bank, unless the franchises of the bank are derived from its grant, does it not follow that a corporation created by one State, and yet domiciled and dealing in another, cannot be taxed by the latter?

That this particular bank is a depositary of the public moneys and a fiscal or financial agent of the government of the United States, can give no aid to the claim of exemption from taxation here insisted on. Not more than one national bank in ten is such a depositary or financial agent. Each is a complete corporation without being such, and if there be exemption under the act of Congress, it is for all alike. If the government should make an individual banker in Kentucky a depositary of the public moneys, and its financial agent, it is not easy to see how this would entitle him to claim exemption from State taxation upon his personal property.

When the government deposits its funds in such a bank,

these deposits are not taxed by the State, nor is the tax on the shares of its stock increased. If it becomes a favorite of the government, and is permitted to trade upon the public moneys and loan them out at interest for its own profit, one fails to see upon what ground this can give it a right to be exempted from any taxation to which it had before been subject. If it is employed as a financial agent of the government, there is the same difficulty in seeing a reason for such exemption of the shares of the stockholders. It is a person and individual in law, and becomes in no degree more sacred by having public moneys placed in its keeping, as they might be placed in the keeping of any other individual, or by being employed by the government as its agent, to render special services for sufficient compensation. It is not *created* as a governmental institution or an adjunct of the Treasury. It is created a corporation for banking purposes, invested with individuality, and may or may not afterwards be employed, as an individual, by the government. And we shall see hereafter that, according to the most venerable and authoritative decisions of this Court, not only is there no ground or reason whatever for a claim of exemption from State taxation, by a national bank not employed as depositary and financial agent of the government, (which is, indeed, a proposition too evidently true to need to be proven by argument or established by authority); but also that these associations, created for private purposes and profit, are not entitled to exemption, even when selected, subsequently to their creation, by the Secretary of the Treasury, as depositaries and financial agents.

The counsel of the bank insist:

1st. That the tax levied under the Kentucky statutes is not a tax upon the shares of stock, as the property of the respective shareholders, but a tax on the capital stock itself, as the property of the corporation.

But the capital stock is not the property of the corporation. The real and personal estate, moneys and assets, which constitute the capital of the corporation, are its *property;* but the capital *stock* is divided into shares, and is the property of the individual and respective shareholders. The capital stock may be, and often is, much larger, and sometimes is smaller, than the property and assets of the corporation. It is a totally different thing from the property and

assets. It may be worth five times its nominal amount, or be entirely worthless. A share, nominally but an hundred dollars, is really the representative of only so much as may be finally realized from it when the affairs of the bank are wound up, including also the dividends paid on it from time to time.

To tax the *corporation* upon its capital stock would be to tax that which does not belong to it, and to tax it as for much more or much less property than it possesses. With a capital stock of $300,000, the property and assets of this bank may not be of a value greater than $100,000, and may be $500,000.

The whole question on this point is this: The State has a right to tax the shares of stock at their par value. They cannot be taxed by any other State. Has she not also a right to say to the shareholders, "I am not constrained to look to you individually for the payment of the tax which I am authorized to levy on the shares of stock of each. Of those of you who are not resident in the State, I *could* collect nothing, and of many resident in it I *might* collect nothing, unless I could levy the tax specifically on the shares, and subject these to the payment of it, as if it were a lien upon them, enforceable by sale or in some other efficient mode. You are really the corporation. You own individually all the stock; and the officers of the bank are your authorized and accredited agents. You must pay the tax through them, or I will hold them personally responsible."

The Court of Appeals well said in this case that the tax was really and *bona fide* a tax on the shareholders; "but as many of these were non-residents and could not be reached by laying taxes on their shares or stock, and looking to them for payment, the State laws required the cashiers of the banks to pay this tax for their shareholders. * * * The great, if not the sole object of Congress, was to secure the National Bank Associations from a discriminating tax, and not that the tax should be collected in a particular manner. * * * When the State shall only tax shares in the National Banks at the same rates, and shall collect the tax by the same means, as are applicable to the State Banks, every substantial requirement of the National Bank Act of Congress has been complied with. To suppose that Congress intended that the States should exercise this sovereign power, as to taxing shares in National Banks, which they by their State

laws exercise as to the shareholders of their own banks, and then to quibble about the means of collecting the tax, is beneath the dignity of the question and the high source of the enacting power."

The holders of the shares of the stock, at the time when the tax is payable, ought to pay it, because the shares are then their property, whether they have or have not been transferred to them on the books of the bank. The State of Kentucky is entitled to levy and collect a tax on *all* the shares, no matter by whom or where held; and they cannot be taxed by any other State. All stocks are being continually sold and purchased at the stock exchanges, and far more at that of the city of New York than at any other. The lists of the shareholders required to be kept by the bank could not possibly show who were holders of the stock at any given moment. In the current transactions of the stock exchange it passes from hand to hand by mere delivery. It is certainly not just that one who has disposed of his stock should be made to pay the tax upon it, and the holder be released from it. It ought to be a charge or burthen on the stock itself. Held abroad to-day, a hundred shares may be held by residents of Kentucky to-morrow, and yet the holders, not being on the lists kept, not be discoverable to be taxed.

When the power to lay the tax on the shares is conceded to exist in the State, the mode and means of making that right effectual fall within the domain of the sovereignty of the State. When a right is granted, a well-known maxim says, the means also are granted by which that right can be made effectual. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.* In statutes, incidents are always supplied by intendments; in other words, wherever a power is given by a statute, everything necessary to the making of it effectual is given by implication.—2 *Inst.*, 306, 12 *Co.*, 130, 131. *Mitchell* v. *Maxwell*, 2 *Flor.*, 597.

Qui concedit aliquid, concedit omne id sine quo concessio est irrita, Jenkins, 1*st Century*, *Case* 63, *Witherspoon* v. *Dunlap*, 1 *McCord*, 546; *Field* v. *The People*, 2 *Scam.*, 79. And it may well be doubted whether, disclaiming intention to deprive the States of the right of taxing shares of stock in these banks as personalty, Congress could interfere with the exercise of that sovereign power of taxation, by prescribing the *mode* in which only it should be exercised. Certainly, to

prescribe a mode which would render the conceded right and power ineffectual, would be wholly inconsistent with and render worthless the disclaimer, and operate a fraud upon the States. The power, we say again, is not *granted* to the States; but the intention to take it away is broadly disclaimed. If the National Government could not grant the power, how can it prescribe and limit the mode of its exercise?

Justice and equality require that each share should be taxed alike, that the tax on each should be paid, and that it should be paid by the holder of the share. How are all these objects to be attained? Only by taxing the shares themselves, as by the creation of a charge *in rem*. But to what avail do that, if the charge could only be enforced, and the tax collected, by a sale of shares every day changing owners in remote markets? Who would purchase at such a sale? What title would the sale give?

The tax *will* be paid by each share alike, only when it is so laid and collected as equally to diminish the value of each share in the hands of whatever holder it may be. Now the assets of the bank are in reality the common property of the shareholders, each having an interest in them exactly proportioned to the number of his shares. If a tax equal on each share is paid out of these assets, the value of each share will be diminished by the exact amount of the tax, which will thus be really borne and paid proportionately by each holder.

The mode adopted in Kentucky is, therefore, the only mode by which the power and right to tax each share, involving the right to *collect* the tax on each in *some* mode, can be made effectual, and the State can have the command of all its resources. In the language of the Court of Appeals, "What other convenient and certain mode is there of getting the tax from the non-resident shareholders but by making it the duty of the officers of the institution to pay for its stockholders? But it is convenient, even if all the stockholders are residents, for these would be scattered through the various counties of the State."

And the Court well said, that there is no provision of the Congressional enactment authorizing these Associations, to prevent the State requiring the officers of the Association to pay the tax levied on its shareholders." Every one knows that the profits and dividends of these institutions must be

very large if they are honestly managed. They are too large, and a serious tax upon the country. Unless by gross mismanagement, it is impossible there should not be profits; and these profits, to be distributed as dividends, or in part retained under the act of Congress, are, in the hands of the officers of the banks, the individual moneys of each shareholder; so that the Kentucky statutes merely require the cashier to pay the tax of each stockholder out of that stockholder's own moneys in his hands; and it was the duty of these officers, before paying over any dividends, to deduct from each the tax required to be paid out of the profits.

"I always suspect a fallacy," said Mr. Justice PERRY, in *Natha & Co.* v. *Jewraz Balloo*, 2 *Morley, Dig. of Ind. Cas.*, 420, "is lurking in the ratiocination, where I see some particular word introduced, and harped upon, and twisted into every possible shape. Reasoning is so apt to degenerate into verbal disputation, that the greatest care is necessary to prevent one's self losing sight of sense and ideas, in vain discussions upon the mere counters which represent thought." In this case great stress is laid upon the notion that the tax demanded is a tax upon "the capital stock of the bank," and not upon the *shares*. "The shareholder," it is urged, "is neither named nor known in the transaction. It is a matter between the State and the bank. The shares of one hundred dollars are used simply as a means of computing the amount of tax on the capital stock." We cannot but ask, with sincere respect, whether these phrases are not the mere counters of thoughts? What real difference is there between a tax on the capital stock and a tax on each and all of the subdivisions, parts and parcels of that stock? What is meant by the phrase "the capital stock of *the bank*"? The bank is not the proprietor of the capital stock. It is parcelled out by shares, and is wholly the property of the shareholders. The bank is even forbidden to own any of it; and if it did so, it would be but a shareholder, like any other.

Of course, the shareholder is neither named nor known in the transaction. He cannot, in many, if not most cases, be *known*, for no one can at any moment ascertain in whose hands the stock is holden. Of course, not being known, they cannot be named. The only question is, whether the *shares* are taxed, no matter in whose names, or if not in any names, and if the shareholders, in *reality*, bear the charge of the tax.

It *is*, in one sense, a matter between the State and the bank. The State looks to the shareholders' funds, in the hands of the officers of the bank, for her taxes, and requires them or the bank, as the agents or agent of each shareholder, to pay for those whose agents they both are.

It was not necessary to use the *shares* as a means of computing the amount of tax on the capital stock. To do that it was only necessary to levy a tax on the whole, of so much per centum; and then it could have been said with just as much reason that the *capital stock* was used as a means of computing the amount of tax on each share of a hundred dollars, or on each hundred dollars of the stock. The learned counsel are surely in error in imagining that without some such device as they suppose for the purposes of their case, a tax could not be levied at all on the capital stock; i. e., that it was indispensable to resort to the contrivance of fixing a certain per centum on some aliquot part of the stock.

They urge that *bank stock in the hands of the bank* is required to be taxed so much, and the amount to be paid by the bank—"not *shares of stock* as held by shareholders, but *bank stock*." And they ask, "What stock does the bank own, except the capital stock, *which is identical with itself?*" How can a bank *own* what is *identical with itself?* Is this not to say that it owns itself? The bank does not own the capital stock. The stockholders, individually, own it all. The "shares of stock as held by the shareholders," *are* "the bank stock." There is no "bank stock in the hands of the bank." It holds none of the *stock*. It holds the *assets*, which may be less or more than the stock, and especially less, if the stock has been *watered*.

It is urged that the capital stock of State Banks in Kentucky is not invariably divided into shares of $100 each, the shares of some being $25 each, and of some $500. As to all the *State* Banks, the taxation is governed by the old law, which levied the tax in the alternative, fifty cents on each share of $100, or on each hundred dollars of stock owned by individuals, &c. The phrase "fifty cents on each hundred dollars worth of stock," is precisely the equivalent of "one-half of one per centum." Could it be argued that under a law imposing a tax of one-half of one per cent., or fixing that rate of interest, a share of only twenty-five dol-

lars would be exempt from taxation, or a sum less than one hundred dollars bear no interest?

The learned counsel, nevertheless, say, that the two banks whose stock is divided into shares of $25 and $500, respectively, "are taxed annually under the law we have quoted, *supra*, because in Kentucky there are no other laws upon the subject." And then, "The language is '*fifty cents on each share thereof equal to one hundred dollars of stock.*'" But the law under which the *State* Banks are taxed contains the further expression, "or on each one hundred dollars of stock therein;" and it is the act of 1865, applicable only to the National Banks, whose stock is, by the provisions of the act of Congress, divided into shares of one hundred dollars each, which contains *only* the expression, "fifty cents on each share thereof, equal to one hundred dollars." Quoting this as if it were the only provision in the statute applicable to the State banks, to which the statute of 1865 does not apply at all, the counsel say: "If that means a tax upon the share, as the Court of Appeals holds, the shares in the said banks being respectively twenty-five and five hundred dollars, and the law providing only for a tax on shares equal to one hundred dollars, *nothing could be clearer than that no tax at all is levied on their shares.*" Wherefore, they insist, the tax levied on the National Banks exceeds the rate imposed on some of the banks organized under the authority of the State.

This conclusion is reached by quoting as applicable to the State banks a law that does not apply to them, instead of that under which stock is taxed "fifty cents on each one hundred dollars," or one-half of one per centum. The premises being erroneous in fact, we need not inquire whether, if they were as stated, the conclusions would be correctly drawn.

A not much more forcible argument is, that the tax claimed here is on the capital stock, and not upon the shares, because the account or bill of particulars is against the bank, and the suit is brought against it, and not against the shareholders.

The tax is undoubtedly levied on the capital stock. The whole of that is the property of the shareholders. It is therefore necessarily levied upon it as *their* property, and not as the property of the bank, which it is not. The statute requires the officers and managers of the bank to pay it, for

the shareholders; and the only question is whether, if they do not, the bank which holds the money that should have been so paid becomes itself responsible for it, and can be compelled by suit to pay it; in other words, can the agent, holding the funds of the principal, and required by law to pay a certain demand for him, be made by process of law to do so?

It is insisted for the bank that the tax being on "the capital stock of the bank," it cannot be collected; and for this two reasons are urged:

First: Because of the investment of the capital stock of the bank in Government bonds and securities. "A tax upon the capital stock is a tax upon the bonds and securities of which it is exclusively composed." No tax can be imposed on the bonds; "yet this would be done by taxing the capital stock."

If a tax on the capital stock is a tax on the bonds, then a tax on all the *shares* of that stock is so, by whomsoever the tax is paid. A fallacy lurks in the phrase, so often repeated, "the capital stock of the bank," because it is made to express the idea that the capital stock of the bank is the *property* of the bank, which it is not. And there is a like fallacy in the statement that the capital stock is *invested* in Government bonds and securities; because this is made to mean that the capital stock *consists* of these bonds and securities, and they *are* the capital stock. But they are *not* so; and the capital stock does not consist in these. They are one thing, and the capital stock another and wholly different thing. When the subscribers to the stock of a bank pay in the nominal amount or value of the shares subscribed for by them, they *purchase* so many shares of the stock, with the money paid in; and that *money* is the property of the corporation, while the *stock* is *their* property. The money constituets the capital of the bank, but not its capital stock.

A tax, therefore, on the capital *stock* is not a tax on the bonds and securities which have been paid in by the subscribers, or purchased with the moneys paid in by them. These bonds and securities, like a capital in coin in the vaults, may be disposed of, paid away, dissipated or stolen, so that, existing no longer as the property of the bank, they could not be taxed as its property; but the capital stock, held in shares by the stockholders, would continue to exist as much as ever, wholly unaffected by the disappearance of the bonds and

securities; while, on the other hand, the *capital* of the bank, in coin or securities, might largely increase by profits and accumulations, and yet the capital *stock* not be increased in *amount*, how much soever the shares have increased in market value.

How, then, is a tax on the aggregate or whole capital stock, any more a tax on the capital in coin or securities, than a tax on all the shares, but levied on each share separately? Certainly *all* the parts constitute the whole; and if it were true that no tax can be levied on the capital stock, because it would be a tax on the bonds and securities, then none could, for the same reason, be levied on the *shares* of the capital stock.

In *Weston* v. *The City of Charleston*, 2 *Peters*, 449, it was decided that a tax on stocks of the United States, held by an individual citizen of the State, was virtually a tax on the power to borrow money on the credit of the United States, and could not constitutionally be levied by a State or under the authority of a State; on the ground that the powers of a State could not rightfully be so exercised as to impede and obstruct the free course of these measures which the Government of the States united might rightfully adopt. And whatever cogency there may be or seem to be in the dissenting opinions of Messrs. Justices JOHNSON and THOMPSON in that case, it is now firmly settled that the means of an individual or the capital of a bank, invested in securities of the United States, cannot be taxed by a State.

A citizen of a State may thus, by investing his fortune altogether in national securities, cease to share any of the burthens of the government of the State, or to contribute to its support or make any return whatever for the protection which its laws and institutions extend over him and the business in which he employs the means which it cannot tax. True, it is deemed that he pays for the securities a price larger than they would otherwise bear in the market, by the exact amount of tax which the State and corporation stocks pay, and from which these national securities are exempt. But if it is so in fact, still the inequality and injustice remain, that this in nowise benefits the State, and that the United States takes from it the power of compelling part of the citizens to contribute in proportion to their wealth to the support of the State government.

It will probably some day become a very serious question

whether there was any solid foundation for the fabric of jurisprudence that has been built up, in limitation of the powers of the States and to their manifest detriment and the diminution of the most important of their reserved prerogatives of sovereignty, by the argument in *McCulloch* v. *Maryland* and by *Weston* v. *Charleston.*

In *McCulloch* v. *The State of Maryland* it was attempted, under a statute of Maryland, to compel the Bank of the United States to use paper stamped by the State, for its notes to be issued in Maryland, or to pay the State, annually, fifteen thousand dollars.

The Court decided that the States could not tax the *means* employed by the Government of the Union for the execution of its powers; that the right never existed, and therefore the question whether it had been surrendered did not arise.

It held, however, that the real property of the bank could be taxed, in common with all other real property in the State; and declared also that the opinion given did not extend "to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." But the tax which they were considering, requiring the bank to issue its notes on stamped paper purchased from the State, or, instead, to pay $15,000 annually, was, the Court said, "a tax on the *operations* of the bank, and, consequently, a tax *on the operation of an instrument* employed by the Government of the Union to carry its powers into execution.

In *Osborn* v. *The Bank of the United States*, 9 *Wheat.*, 738, the State of Ohio had imposed an annual tax of $50,000 on each office of discount and deposit of the Bank of the United States in that State. It was held that the tax was constitutional. The tax was really imposed on the offices of the bank by way of penalty, on the avowed ground that they had been established in the State in violation of its laws; and it could therefore be fairly considered as not a ratable tax on property or capital, but an amercement, intended to impede and obstruct, by an enormous burthen imposed, the operations of the bank in that State, if not to prevent these operations altogether, by making its business there unprofitable.

And in *McCulloch* v. *Maryland*, the act of Maryland imposed a direct burthen on the business of the bank, not by a tax on its capital according to value, but by requiring a

stamp duty to be paid to the State upon its notes of circulation, or a heavy penalty in lieu of such duty.

In *Bank of Commerce* v. *New York City*, 2 *Black*, 620, where eight millions of the capital of the bank, invested in stocks, bonds, and securities of the United States, were included in the assessment of taxes of the city, as so much property, the Court reaffirmed the decision in *Weston* v. *The City of Charleston*, on the ground that to tax the securities of the United States, whether as such and as distinguished from other personalty or funds, or as part of one's capital, was the exercise of an authority by the State trenching upon the powers granted to the General Government; an attempt to use the power of taxation *on the means* employed by the Government of the Union in pursuance of the Constitution; and in derogation of the supreme powers granted to the General Government. The exercise of these powers, or of the power to borrow money, was held to be *interfered* with, by a tax on the stock or bonds, to the extent of such tax, the liability of the certificates to taxation by a State, in the hands of individuals, affecting their value in the market, and the free and unrestrained exercise of the power.

In the *Bank Tax Case*, 2 *Wallace*, 200, it was held that a tax laid by a State on banks "on a *valuation* equal to the amount of their capital stock paid in, or secured to be paid in, was a tax on the *property* of the *institution*, and void, if that property consisted of stocks of the United States.

The capital *stock* of a bank is not paid in. Those who take and own that stock pay in, in coin or securities, the nominal amount and value of the stock which they hold; and whatever is thus paid in or secured to be paid in is the *capital* of the bank, *its* property, and not the capital *stock*.

It was forcibly argued that the Government which borrows money on securities that are to be subject to taxation will receive as much less per centum from the lender as would nearly equal a capital sufficient to raise an interest equivalent to the rate of taxation; so that stock, which at par would pay six per cent. interest, without taxation, would be worth only sixty-six, if the lender is obliged to pay a tax of two per cent. So that the burthen of the tax falls on the National Government, in whatever mode levied; and the converse is equally true, that the exemption inures to the benefit of the United States.

These decisions essentially proceeded upon considerations

of public policy, and upon argument, as to the entire soundness of which there will always be difference of opinion.

"Fortunately," it has been said, "we have the light of experience to guide us in pointing out the extreme danger which is incurred when courts of law go out of their path, and found their decisions, not on solid juridical grounds, but on their own imperfect notions of what public policy requires. The Common Law can scarcely boast of two abler men within its own particular sphere than Lords Kenyon and Tenterden; and yet, when they assumed to apply their notions of public policy to the contracts between man and man, they laid down doctrines that made the whole commercial world tremble, and which the veriest tyro in political science would now repudiate." Mr. Justice PERRY, in *Thakoorseydass et al.* v. *Dhoudmull*, 2 *Morley, Ind. Cas.*, 415.

"Public policy," in the words of Mr. Justice BURROUGHS, 'is an unruly horse, and if a judge gets upon it he is very apt to be run away with.' Where public policy accords with the well-recognized track of morality, it is the duty of the judge to make every decision conform to it, if the letter of the law permits; but where public policy is a matter of controversy, a lawyer should be the last to express any opinion upon it."—Mr. Justice PERRY, *Case of the Kojahs*, &c., 2 *Morley, Ind. Cas.*, 431.

Of course, there is always reason to suspect argumentation of being at fault, when, in the estimation of learned judges, it leads directly to conclusions not at first foreseen, and which other equally acute intellects deem erroneous and contrary to the public welfare. Public policy will then be seen to shift sides, and judicial verdicts to change.

From the decisions that the *capital* of a bank, invested in public securities, could not be taxed, because this would be to tax the securities themselves, seemed naturally to flow the further conclusion that the stockholders of such banks, real owners of the capital, could also claim that their shares of the stock were equally exempt from State taxation, for the same reason. But, as has been said by a very eminent Court, the consequences of such an exemption, in a country having so immense a public debt, would be frightful. In any other country, it would produce a revolution. In this, it would array labor against capital, disturb and dislocate the internal economy of the States, and in the end deprive these crippled sovereignties of even all respectability, by placing

the great mass of the movable wealth of the State beyond the reach of taxation, and casting all the burthens of the Government upon those species of property, to tax which by disproportioned impositions is to paralyze productive industry and turn fertile fields into deserts.

Accordingly, this court felt itself compelled to stay the process of exemption of wealth from taxation by induction and argumentation; and in *Van Allen* v. *The Assessors*, 3 *Wallace*, 573, to hold, that under the act establishing the National Banks, the shares of stock of these associations, belonging to stockholders, could be taxed as personalty by the States, although the capital of such associations might be invested in national securities. But the Court held that those in New York could not be so taxed, because in that State no tax at all had been laid on *shares* of the stock of the *State* banks, but only on their capital.

The Court said: "The tax on the *shares* is not a tax on the *capital* of the bank; the *corporation* is the legal owner of all the *property*, real and personal, of the bank." The Court then defined the interest of the shareholder, as being the right to his proportion of the current profits, and of the property that may ultimately remain. This interest is his *property;* and it is subject to taxation.

The Court admitted that there was no *grant* to the States of the right to tax this interest or property; that the United States could not make, nor a State receive such a grant; but that, the power to tax being concurrent, and Congress having power to exclude the State, by means of its paramount authority, it might *refrain* from exercising that authority, and leave the States free to act. The power to exclude a State exists when the means and instruments employed in the exercise of the functions of the Federal Government are the subjects of taxation. If any National Bank is not such an instrument or means, has not been employed as such, evidently there is no power in Congress to forbid taxation of such a bank by a State; and therefore it has not, as to all *such* banks, refrained from the exercise of such a power, or left the State free to act. The State has always been free to act, and needed no such permission.

And, as was broadly admitted by the whole Court, in *McCulloch* v. *Maryland*, these associations are not created, as the Bank of the United States was, primarily for public and national purposes. Most of them are never impressed at all with a national character.

The Court in that case (4 *Wheaton*, 359) said, that if the Bank of the United States had been "originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object," the conclusion that the State could tax it would be inevitable. That description perfectly applies to the associations created under the National Banking Act. The Court said: "This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the Government in the transaction of its financial affairs would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. * * * It is not an instrument which the Government found ready made, and has supposed to be adapted to its purposes, but one which was created, in the form in which it now appears, for national purposes *only*."

"We do not maintain," the Court said, "that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties."

All that most of the National Banks receive from the gift and grace of the United States is their corporate existence. They are corporations, created and acting for private purposes and private profit, and when employed by the Treasury Department, it is, in the language of this Court, "a mere casual circumstance." The Government employs them for a longer or shorter time, as it may employ a State bank or private banking house, "in the transaction of its financial affair."

What the Court said in that case was a protest in advance against the corollaries that might be deduced from the theory on which the judgment proceeded.

In *Utica* v. *Churchill*, 33 *New York*, 237, where the case turned on the distinction between the shares of stock of a banking corporation and the property in which the capital of

the bank was invested, and where the Court in very clear and intelligible language demonstrated the soundness of this distinction, and held that to tax one was not to tax the other, it was also declared that the principle that the means and instruments of the General Government cannot be taxed by the States, *was carried to its extreme limits* when applied to the Bank of the United States. It is quite evident that the Court felt this when deciding *McCulloch* v. *Maryland*, and therefore protested as it did against the probable application of the decision to other cases, and cautiously confined it to the very case in hand and the corporation there held to be exempt.

The provisions of the act of Congress as to taxing shares, the Court said, in *Van Allen* v. *The Assessors*, *recognize the sovereign right of the State to tax*, and prescribe regulations and duties to *the associations*, to disembarrass the officers of the State engaged in the exercise of this right.

The minority of the Court in that case argued that these associations were authorized to be created for the purpose of being employed as depositaries and financial agents, &c., and are intimately connected in their functions and operations with the National Government. They are not means and instruments used by the Government, unless they are *employed* as depositaries or financial agents. In supplying a currency they are not such; and five out of every six of of them, we suppose, are never employed in the public service, but are merely associations of individuals, incorporated by the exercise of a doubtful power, and using individual means in banking for private profit.

So far from the decision in *McCulloch* v. *The State of Maryland* applying to these associations, it is directly against them, certainly when they are not employed as depositaries and agents by the Government, and, it seems to us, even when they *are* so employed.

The Chief Justice, speaking for those who agreed with him, as well as for himself, said: "The only ground upon which exemption from State taxes, of the capital, franchises, operations, or property of corporations or associations has been adjudged by this Court, is that of the repugnancy of such taxation to the acts of Congress organizing such corporations or associations, *and making them the agencies or instruments of the National Government.*"

But the act of Congress does *not* make the National Banks so. It merely incorporates them, and authorizes the Secretary of the Treasury to employ them. He may do it or not,

as he may employ a State bank or a private banking house to do the same business. The bank itself may refuse to accept the employment. It is certainly under no obligation to accept it, and cannot be harmed for refusing.

In affirming the decision in this case, in *The People of New York* v. *The Commissioners*, 4 *Wallace*, 244, the Court defined the meaning of the proviso in the National Banking act, that shares in the associations created under it should not be taxed at a greater rate than is assessed on other moneyed capital, in the hands of individual citizens of such States. Whatever per centum is required to be paid as tax, on other capital, of coin or currency, and no more, is demandable upon the shares of the capital stock of the National Banks.

And in this case, and in *Bradley* v. *The People of Illinois*, 4 *Wallace*, 459, the Court again determined that a tax on the *capital* of a bank is not the same thing as a tax upon the *shares* of stock. There is, however, an error in the statement of the point adjudged, in the expression, "the shares of which the capital is composed." The *capital* of the bank is not composed of the shares. The capital stock is. If the capital *were* composed of the shares, a tax on the capital would, of course, be the same as a tax on the shares. A tax on the whole is the same as a tax on all of the parts.

See, further, as to the distinction between the shares of stock and the property of the bank, the dissenting opinion of BELLOWS, J., in *Savings Bank* v. *Nashua*, 46 *N. Hamp.*, 400.

In *Wright, Auditor*, v. *Stilz*, 27 *Indiana*, 338, the Court agreed that a tax on shareholders, for the value of their shares, was not a tax upon the property held by the corporation; one reason assigned being, that the aggregate value of the shares is not measured by the net aggregate value of the assets of the corporation, but may be greatly more or less.

The simple truth is, that the shares of stock are as distinct from the capital, i. e., the property and assets, of the bank, no matter of what these consist, as the stockholders are in law distinct persons from the corporation; and they are a wholly distinct property in law, *because* the stockholders, who own the shares of the stock, *are* wholly distinct persons in law from the corporation, which owns the capital. The stockholders cannot have the benefit of one-half of the legal fiction, and reject the other half; cannot have two distinct legal existences, and only one and the same property. See *Goodell Man.. Co.* v. *Trask*, 11 *Pick.*, 514. If the whole cap-

ital of a corporation is land, its stock, and the shares of the stock, are personalty. Undoubtedly, if a bank invests part of its capital in national bonds, so much of its capital is not taxable by State authority, under the decisions of this Court, as personalty or funds, and as the property of the bank. But the conversion of the capital into national securities has no more to do with the stock in the hands of the shareholders than if part of the funds, instead of being so invested, were thrown into the sea, or invested in worthless mining stock.

It is urged, secondly, that no tax can be levied on the capital stock, because of the character of the bank as an agency and instrument of the Federal Government. This reason can, of course, only apply to such of the National Banking Associations as may be selected as such agents and instruments, and to these only from the date of such selection, and during the time when they are employed and act as such agents and instruments. It is not a general exemption and immunity for all, indifferently. But as the pleadings in this case show that the First National Bank of Louisville has been, during the whole period for which the tax is claimed, a depositary and financial agent of the Government, it is necessary to inquire whether "the tax imposed in this case is, in substance and in fact, a tax upon the operations of the bank itself, and as such emphatically condemned by the authorities" relied upon.

Is it true that a tax imposed on all the shares of the capital stock, it all being the property of the shareholders and not of the corporation, is a tax, in substance and in fact, upon the *operations* of the bank itself, or upon the bank or the property of the bank? It would certainly not be so if, being imposed on all the shares, it was collected directly from the shareholders; or, if it would, it is expressly allowed by the act of Congress, and by the same act the non-resident stockholders are liable to pay it, and cannot be taxed elsewhere upon the same stock.

Suppose, then, that the statute of the State provided that the bank or its officers and managers should pay, out of the profits or dividends, or even out of the general assets, the tax levied on all shares not held within the State, or for which the shareholders could not be found, to be made responsible. If there were no such provision, is there no process or proceeding, at law or in equity, by which, under the general law, the bank, holding the profits or assets belonging

to delinquent stockholders liable for taxes, could be made to pay them, as other parties can, who hold funds legally or equitably belonging to debtors of the State? If so, the statute would but provide the means of enforcing a liability existing under the general law. Would the tax on the shares held by persons abroad, and which could not be collected of them, but which the bank was required to pay for them, be a tax on the operations of the bank? If not, is it any more so when the bank or its officers are required to pay the tax due by *all* the stockholders, upon *all* the shares of the capital stock?

No property of the bank itself is taxed. Whether its capital (i. e., its assets and funds) consist of coin or of bonds and securities, and whether it is larger or smaller than the whole amount of the capital stock, it is not the subject of the taxation. The law does not levy the tax on that capital or the assets, nor inquire into their amount, nor of what they consist. Neither are the profits or income of the bank taxed. What these are, the statute does not inquire. How, then, is there any tax on the *operations* of the bank? There is a tax on the stock belonging to individual stockholders, which the State has a right to levy and of course to collect; and as it *cannot* collect all, and perhaps no part of it, from these stockholders, the State, adopting the only mode by which it *can* be collected, requires the bank, whose assets are equitably the property of the stockholders, to pay the tax for them all. The *mode* in which it is collected, the hand by which it is paid, cannot change the nature of the tax. If it is constitutional to levy it, the mode of collection cannot make it unconstitutional, because, under the mode adopted, it is *really* paid by the stockholders, the stock of each being diminished in value in exact proportion to its nominal amount, and each share paying its own and the same tax.

Suppose that one individual, residing in New York or London, owned *all* the stock of this bank. It would be virtually a corporation sole. He would be liable to pay the whole tax. Would it be unconstitutional to require him, in his character as a corporation, to pay it for himself? Would it not be simply to require him as a corporation to do what he would, under the general law, be compelled to do by a proceeding in equity?

And if there are two stockholders only, and the two, being not to be reached individually by the power of the State, are compelled to pay through the corporation, which

is really themselves, does this mode of compulsion make the tax unconstitutional? If not, it is no more so if there are an hundred stockholders.

This Court knows nothing in regard to the holders of the stock of the first National Bank of Louisville. One man may hold all the stock, or it may be in an hundred hands. All the stockholders may be non-residents of Kentucky, or the sole stockholder may be. The defence of the Bank excludes none of these conclusions. It neither shows nor avers that the State had it in her power to collect from any holder of the stock, the tax which it unquestionably had a right to levy, and in some manner or other to collect. It does not complain that the State seeks to collect more than it is entitled to collect from the stockholders, but only that it attempts to collect it, not of them directly, and as individuals, but of them as a corporation; without alleging that it is in the power of the State to collect a dollar of it from a single holder of the stock, or that a single stockholder resides or has property in the State. It does allege that "the shares of its capital stock are the property of the individual shareholders; that it has no property in them;" and that, "in fact it is by law forbidden to own or hold any share of its stock."

The learned counsel say that, "in delivering the opinion of the Court below, the Chief Justice declares that the acts of Assembly relied on as imposing the tax herein, levies the tax on the shares, and not on the capital *stock*. This is a mere declaration. It is taken for granted, and no reason is assigned or argument adduced in support of the position."

But this is what the Court below said: "As was said by the United States Supreme Court in *Van Allen* v. *The Assessors*, 3 *Wallace*, 584, "the tax on the shares is not a tax on the *capital* of the bank," and "that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limits prescribed by the act authorizing their organization." This Court is not quoted as saying that a tax on the shares of the capital stock is not a tax on the capital *stock* of the bank. The Chief Justice of the Court of Appeals did not confound the *capital* of the bank and the capital *stock* of the bank, owned by the stockholders. He said: "This State statute does not tax the *capital* of the banks, but the shares of one hundred dollars; and whether these shares be worth fifty dollars or two hundred dollars each, matters not." And

again, "as the tax is laid upon the *shares*, and not upon *the capital of the bank*," &c.-The *value* of the shares mattered not; because that depends on the amount of the actual capital held by the bank, as compared with the amount of the capital *stock*. The latter being $300,000, the former might not be one-half that amount, and it *might* be much more than $300,000. The nominal and taxable amount of the aggregate of the stock is no measure at all of the amount of the actual capital.

The Court of Appeals said: "It will be seen that no adjudication of either the Supreme Court of the United States or any State has as yet decided that where a State taxes the shares, and not the capital, of her own banks, and then looks to the officers of the bank to pay this tax, instead of pursuing each individual stockholder, that the same tax, to be collected in the same way, may not be assessed upon the shares in the National Banks."

That is quite true; and after all, it is the real and whole question in this case.

The learned counsel of the bank urge that even if the law of Kentucky lays the tax simply on the shares of the stock, still the manner of collecting the tax contravenes the National Currency act, and makes it in effect a tax on the bank itself. They insist that the right of the State to tax at all is merely permissive, and a mere delegation of authority to that extent. But, as we have already said, and as is too evident to be denied, the act of Congress does not pretend or purport to grant to the States the right to tax the shares of stock, or to confer on them any right to do so, but simply disclaims any intention to forbid the exercise of that power. There are no words of grant or permission. Neither could there be, for the right of the States to tax property within their limits is a right which they have by virtue of their sovereignty, however qualified and limited that sovereignty may be, and is not taken by them by the grant or permission of any human authority. The idea that there is a *delegation* of authority, by the United States to the State, to tax shares of stock which are personal property, is a novel one, to say the least. The *delegatus* acts for his principal, as by a power of attorney, and not for his own benefit or in his own interest.

But, upon this notion, the learned counsel submits, "that in order to be lawful in the exercise of this authority, the

State must perform it in the manner and to the extent permitted by the grant, and in no other way." *Permitted by the grant!* There is no grant; and there is no permission. The United States creates a banking corporation, as it may create a corporation to build a bridge or run a ferry. What superior or peculiar sanctity does the majesty of the creator communicate to the artificial person so created? It is simply an individual, a unit, empowered to carry on the business of banking. Does the State in which it proceeds to carry on its business need a *grant* or *permission* from Congress to enable it to tax this particular legal personage, any more than to tax any natural person, resident and owning property within its limits? But the supposed *grant* and permission are not even to tax the corporation, but only to tax the individual stockholders, on account of the shares of stock owned by them, and composing part of their personal estate.

There being no grant of this power, but only an acknowledgment of its pre-existence, the argument based on this erroneous and unstable hypothesis is like a house of cards built on the sands.

The States, as a general rule, have the right to determine the manner of levying and collecting taxes on private property within their limits; and may declare that a tract of land shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed, and that an erroneous assessment shall not vacate a sale for taxes. *Witherspoon* v. *Duncan*, 4 *Wallace*, 210. May they not as rightfully levy a tax on shares of stock, without reference to the particular owners, and require it to be paid by the one and only general agent of all?

We need not cite the cases in this Court which have recognized the right of the States, as sovereigns, to tax persons and property within their limits. We should find none which have held that this is not a power *delegated* by the General Government; for that is a notion which never before occurred to any one.

The counsel insist that Congress never could have intended to subject the Banking Associations created by its authority, in any event, even formally, to the control of the States. It gives the States, they say, rights over the shareholders, but the corporation itself is free from State action. The association, created by the United States, and receiving no privilege, franchise, or rights from State legislation, "is as free

from the control of the States as the forts, dock-yards, arsenals, &c., of the General Government."

That argument goes a very long way. It applies to *all* these associations, and not to those only which are depositaries and financial agents. The act of Congress does not *give* or *grant* to the States any rights over the shareholders. In what words does it pronounce the exemption, the immunity, and the sanctity claimed by the counsel for these ordinary banking institutions? We do not read them anywhere. It says this, and this only: "It is not intended to declare that the States may not tax the shares of stock in these associations, as the personal property of the shareholders, to the same extent as they tax the stock of their own banks." The law of Kentucky then in force provided the manner in which shares of bank stock, owned by individuals, were to be assessed and taxed, and the tax collected. Where is the provision of the act of Congress which declares that taxes assessed on shares of stock in the National Banks shall not be collected as the like tax was then by law collectable upon shares of stock in banks of the State?

The argument for the bank is, that it is an instrument and agent of the General Government, and as such cannot be impeded and burthened by being compelled to collect State taxes from its shareholders; cannot be transformed from a national agency into a State servant, and compelled to perform a burdensome duty, not enjoined by its charter; that this is a tax of time, patience, and coerced responsibility, interfering with the fiscal agents of the Government; and that "every burden imposed by a State which may interfere with and impair, to any extent, the free and perfect command and use of all the appropriate instrumentalities of the General Government, is forbidden."

This is to give a new and much wider meaning to the terms "impede" and "burthen" than they had in the case of *McCulloch* v. *Maryland*, and those that have followed in the same track. There the Court denied the power of the States to hinder, impede, or obstruct the *operations* of the instruments employed by the Government in the discharge of its functions. It would be difficult, we think, to show how this is effected by requiring the banks, as the agents for their shareholders, to pay for these shareholders the taxes, to levy which the right of the States is admitted. In *McCulloch* v. *Maryland* and *Osborn* v. *The United States*, the inten-

tion of the legislation of the States of Maryland and Ohio was to impede and burthen and obstruct the operations of the bank; the obstructions and hindrances were grave, important, and effectual, and dictated by a declared hostility to the institution. Can it be said, in anything like the same sense, to be a hindrance and obstruction to the operations of a National Bank, to require it to pay a lawful tax? Is it not equally an obstruction and a burthen to compel the stockholders themselves to pay? The argument in this case shows how easy it is to give to vague and general phrases a wrong meaning, and to push argumentation beyond lawful limits. By the same kind of logic it was endeavored to be demonstrated that the shares of the capital stock could not constitutionally be taxed; the argument being, in brief, that to tax the capital invested in bonds is the same thing as to tax the bonds themselves, which cannot constitutionally be done; that the capital stock and capital so invested are identical, and that to tax the shares of that stock as the property of the shareholders is, in effect to tax the bonds. The argument would have been complete in its fallacy if it had added, that the corporation and its stockholders are in fact identical; and that the property of the bank is in reality the property of the stockholders, and the stock of the stockholders is in reality the interest of each in the capital and in the bonds in which it is invested.

In *Abbott* v. *The City of Bangor*, 54 *Maine*, 545, the Court said, that Congress had deemed it necessary so to limit the power of the States to tax the shares of stock as to preclude them from imposing such unequal burdens on that species of property as would prevent investment therein. "Under these limitations," the Court said, "the matter of taxation, by or under State authority, is left open to the action and effect of State legislation. When the general tax laws of the State permitted the assessment of these shares, and conformed to the restrictions imposed by the act of Congress, no further action on the part of the State Legislature was necessary. Nothing in the act of Congress was to be construed to *prevent* such assessment. But it was equally foreign to the design of Congress so to intervene in the matter of the assessment of taxes by or under State authority, as to *require* such assessment, or to change or control the effect of any State law, by virtue of which it must be made, (if made at all,) for State and local purposes. * * * The liability

of the shareholders in them, to taxation for State, county, and municipal purposes, must depend upon State legislation, which is found to be not in contravention of the limitations imposed by Congress."

The act of Congress is correctly interpreted by this decision. Nothing in it is to prevent *all* the shares of any National Bank "from being included in the valuation of the personal property" of the stockholder. It is too clear to need argument that the meaning of this sentence is that nothing in the act shall be understood as forbidding every share of stock in such banks being estimated as personal property of the value of one hundred dollars, in the assessment of taxes of such personal property under the laws of the respective States. That is all: "We do not mean to enact that a share of such stock, which we have declared to *be* personal property, shall not be valued at one hundred dollars, as part of the personal property of the shareholder, in the assessment of taxes in the State where the bank is located; but such shares shall be assessed nowhere else." It leaves each State free to assess and collect the tax in accordance with its laws and customary usages.

The banking law of the State of Illinois, adopted in 1851, declared shares of bank stock to be personal property, subject to taxation; but provided that taxes should be levied on and paid by the corporation, and not upon and by the individual stockholders.

The Court said, in *The People* v. *Bradley*, 39 *Illin.*, 145: "The shares represent the capital stock, and the capital stock represents the shares. If listed by the shareholder, he would pay the tax directly, and if listed by the bank, he would pay the same amount indirectly, as in that case the bank would apply for that purpose what would otherwise go to the shareholder, as a portion of his dividends on his stock. It only accomplished the same end, in a different mode. It is, in either case, a tax on the shares of the corporation, and at the same rate."

The act of Maryland, of 1841, ch. 23, §17, imposed a tax on non-resident stockholders, and obliged the banks to pay it; and in *The Tax Cases*, 12 *Gill and Johns.*, 117, the Court held that non-residents were equally liable as residents to the tax in respect of stock held in the banks of the State.

In *Frazer* v. *Siebern et al.*, 15 *Am. Law Reg.*, 475, the Supreme Court of Ohio decided that the State tax imposed on

shares of National Bank stock was too large; but they required the shareholders, *or their bank*, to pay the treasurer of Hamilton county the amount that might lawfully have been assessed upon them or their bank, if it had been one of the State banks.

Markoe v. *Hartranft*, 15 *Am. Law Reg.*, 487, was decided by a single judge, at nisi prius. The Court held that a State law requiring the cashiers of National Banks to collect a tax of one per cent. from each stockholder, on the stock held by him, and pay the same into the State treasury, did not conform to the mode of taxation provided for by the National Bank act, and was therefore void. The State, the Court said, must proceed by taxation directly upon the shareholder, by including his stock in the valuation of his personal estate. To require the bank to pay it, the Court said, "would subject the bank to a *quasi* foreign and sometimes hostile jurisdiction; would tax moneyed capital, never brought within State jurisdiction, otherwise than by the purchase of shares; and would subject non-resident stockholders to double taxation.

As to this particular point it is only necessary to say that they *cannot* be taxed elsewhere on their shares; and that if the prohibition to that effect were not in the act of Congress, there would be nothing wrong or unusual in such double taxation, as was expressly held in *Dwight* v. *Boston*, 12 *Allen*, 316.

The cases which hold that property cannot be doubly taxed, only undertake to say that this cannot be done in the same State.—*Boston Water Power Co.* v. *Boston*, 9 *Metc.*, 199. *Bangor and Piscataqua R. R. Co.* v. *Harris*, 8 *Shepl.*, 533. *Smith* v. *Burley*, 9 *New Hamp.*, 423. *Gordon's Extrs.* v. *Mayor of Baltimore*, 5 *Gill*, 231. *The Tax Cases*, 12 *Gill and Johns.*, 117.

In New York, non-residents doing business in that State are taxed on all sums in any manner invested there in business, as if they were residents, and these taxes are collectable "from the property of the firms, persons, and associations to which they severally belong." Such was the statute of 1855, which was considered in *The Parker Mills* v. *Commrs. of Taxes*, 23 *N. York*, 242, where the justice and propriety of the tax were amply vindicated. See also *Intern. Life Assur. Soc.* v. *Commrs. of Taxes*, 28 *Barb.*, 318.

By the first statute of New York that imposed a tax upon bank stock, as such, (1823,) the cashier or treasurer was re-

quired to pay the whole amount of the tax, and deduct it proportionately from the dividends of the stockholders, except the stock held by the State and by literary or charitable associations.

The statute of 1847 required taxes on incorporated companies to be paid out of the funds of the company, and ratably deducted from the dividends of the stockholders.

And by the act of 1866, the National Banks are required to retain so much of the dividends belonging to stockholders as may be necessary to pay the taxes assessed. See *The People* v. *Dolan*, 36 *N. York*, 61 to 66. The Court in that case found no objection to the provision, although it commented upon it; nor was the question of its validity raised by the counsel.

In Indiana, a bank charter for educational purposes required a certain sum on each share of stock in a bank to be "deducted from the dividends and retained in bank each year"; and in *The State* v. *The State Bank*, 6 *Blackf.*, 349, the branch at Indianapolis of the State Bank was held liable to pay this tax, on the taxable stock owned by individuals.

The charter of the Cape Fear Bank, in North Carolina, required the president or cashier to pay annually into the State treasury the sum of twenty-five cents on each share of stock owned by individuals.—*Bank of Cape Fear* v. *Edwards*, 5 *Ired.*, 516.

It is therefore not at all unusual to require banks to pay the taxes assessed against their stockholders; nor has the power to do so ever been seriously questioned. What other agent than the bank has a foreign shareholder in the State where the bank is domiciled?

In *Louisville Savings Bank* v. *The Commonwealth*, 14 *B. Mon.*, 409, (decided in 1854,) the banks of the State of Kentucky were held liable for the tax levied on stock owned by their stockholders, and which the cashiers were required to pay. The Court said: "The stocks in all these corporations may be, and frequently are, owned by non-residents, and could not be taxed at all, unless the corporations which are located in this State, and carrying on the business of loaning money for the benefit of such non-resident stockholders, be required to pay the tax." "We decide," the Court said, "that these corporations are liable for the tax, and it is their duty to pay it."

This decision, made long before National Banking Asso-

ciations were thought of, fully vindicated the propriety of that legislation in Kentucky, so much complained of here, by which all banks in that State were required to pay the taxes due by their stockholders. It was the known and lawful mode of collecting such taxes in that State, as it was in New York, when the national banking law was enacted. No *new* law is applied to these; they are not subjected to any strange or before unknown burden. They are merely dealt with according to the old known settled law of the State, prescribing the only means by which the non-resident or unknown owners of stock could be prevented from avoiding payment to the State of any tax whatever. To avoid that is the object of the defence in this case. If the State cannot enforce her law against the banks, there is *no* mode by which she can collect, except from resident and known holders of the stock.

Qui veut le fin veut les moyens is not only a maxim of the French law, but a rule of logic. The Congress of the United States did not intend to hinder or obstruct the States in respect to the collection of a tax upon the shares of stock in these banks, but only to see to it that there should be no discrimination against them by means of a higher tax than that imposed on other moneyed capital or on the shares of stock of banks chartered by the State. Guarding against that, the purpose must be presumed to have been to *facilitate* the collection of the tax by the State, or, at least, to leave the State entirely untrammelled as to the mode and means of collection. Surely it would be very bold to argue that anything contained in the statute of Congress has *repealed* the statutory provisions of *any* State, in regard to the collection of *such* taxes.

The concession of the right of drawing water from a spring, with no fuller words, implies the right of way necessary to go to and return from the spring.—*Duranton, Liv.* 2, Tit. 4, No. 610. The proprietor of the dominant property may therefore do upon the servient property whatever work is necessary for the use and preservation of the servitude; for example, clean out a well, if the servitude be of drawing water; make a road, if it be a right of way; conforming to the instrument creating the servitude, *if it has regulated the kind and extent of these works.—Id.*, Nos. 610, 611.

Congress assents to the end, the purpose and the object to be attained—the levy and collection of the tax. Is it not a

new construction to claim that by doing so it prohibits resort to the known, usual, lawful, and only effectual *means* of attaining the end?

In regard to the propriety and justice of taxing the shares of non-resident stockholders, see *The People* v. *Commrs. of Taxes*, 35 *New York*, 430, where it was held that the owners of stocks of the United States, employing them in banking in a State, were rightfully made taxable by State authority, at the place where the business of banking was transacted; because such property enjoys the protection of the laws and institutions of the State where it is so employed, and ought to contribute to the support of the Government which protects it. As the Court said, (p. 432,) "it is not unreasonable to suppose that all the shares in a bank, located in the city of New York, or in the city of Chicago, might be wholly owned by citizens of other States than that in which it was situated. Congress intended to prevent any injustice, by declaring that non-resident citizens should not be subject to a greater rate of taxation than that imposed on resident citizens," &c.

The Court, in the same case, construed the act of Congress as we do, to provide that the shareholders shall not be taxed upon their shares, anywhere except at the place where the bank is located, "without any reference, or attaching any importance to the consideration where the stockholder or the shareholder resided." The argument of the Court upon this proposition is entirely conclusive. The results of any other construction, it truly said, would be incongruous and unjust. If *all* the shareholders were non-residents, none of them would pay taxes on their stock anywhere. If part only were residents, these would pay taxes, and the others pay none.

How the taxes payable by non-residents are to be collected, the Court did not indicate. Evidently it was taken for granted that the provisions of the statutes of the State in respect to such taxes had lost none of their force nor been paralyzed by the Congressional disclaimer.

To meet the whole case made by the learned counsel for the bank, and to take in front the positions assumed by the Nisi Prius Court of Pennsylvania, in *Markoe* v. *Hartranft*, if we, for the argument's sake, admit that the act of Congress does grant and concede to the States, or *delegate* to

them, if the phrase is preferred, the *right* and the power, which only by such concession they could have, of including the shares of stock in the National Banks among the personal property of the individual shareholders, how is it made out, upon what principle of law is it to be held, that this *concession* of one particular mode of laying and collecting such tax operates on the States as a prohibition against any other and more effectual mode of taxing such shares and collecting the tax imposed?

Evidently upon the maxim, variously expressed, and long ago worn threadbare:

> *Expressio unius exclusio alterius est;*
> *Inclusio unius est exclusio alterius;*
> *Inclusio unius fit alterius exclusio;*
> *Qui dicit de uno, negat de altero:*

which has been thus applied:

"If a new power be given by an affirmative statute, to a certain person, by the designation of that one person, all other persons are in general excluded from the exercise of the power. But the designation of a certain person to whom a new power is given does not exclude another person, *who was by a precedent statute authorized to do it*, from doing the same thing."—11 *Co.*, 59, 64.

The rule of inclusions is dangerous, and to be distrusted.—18 *Duranton*, 212.

The Civil Code, specifying, in Art. 1428, the movable and possessory actions which belong to the wife as only to be exercised by the husband alone, it is very clear that it was not intended to give him also the power of bringing, without joining his wife, immovable actions. The rule, *inclusio unius fit alterius exclusio*, the application whereof ought, undoubtedly, *to be made with great circumspection*, is evidently applicable here.—14 *Duranton*, 429.

The adage, *inclusio unius fit alterius exclusio*, and this other, *Qui dicit de uno, negat de altero*, are inapplicable to this case; unless, however, it results from the expressions of the contract, that the spousees in fact meant to cause to enter into their community only the movable property that might come to them by succession. Adages are, moreover, of dangerous application, because they are often unsound.—10 *Duranton*, 552.

There is no legal maxim of which so bad and mischievous a use can be made as the one we have quoted. If the phrases

used in the act of Congress *are* a grant of the power to tax shares in a particular manner, it does not at all follow that this involves or implies a prohibition against taxing them in another manner. We need not ask where the authority is, in the Constitution, armed with which Congress can forbid a State to levy and collect a lawful tax in a particular way.

Another maxim of the civil law, and one more applicable, is:

Is qui potest prohibere, et non prohibet, consentire ac mandare videtur.—Law 60, *ff., de Reg. Jur.*

If we admit that Congress *could* forbid the States to tax these shares, it certainly *has* not prohibited it, and must therefore be deemed to consent to and permit it. If it *could* forbid the collection of the tax on shares, by demand of payment from the banks, it has not done so.

Nor, indeed, does the act provide for any particular mode of collection. It does not look in that direction; does not deal with that subject; and, as in that it *expresses* nothing, it of course *excludes* nothing.

It is urged that to concede to the State the right to enforce the payment of the tax, in the mode prescribed in Kentucky, "carries with it, necessarily, the right of the State to exact penalties from the bank and its officers to secure its enforcement;" a right which, if conceded, "may, and actually does, involve the destruction of these national agencies."

This is because the old law of the State provided that if the tax levied on bank stock should not be paid, the bank, or corporation, should forfeit the privileges of its charter.

This could, of course, apply only to corporations created by the State. When it was enacted, there were no National Banks; and if there had been, the provision could not have been deemed to apply to them, because it is not in the power of the State to deprive them of their charters. And the act of 1865, requiring the officers and managers of these banks to pay the tax, provides no penalty at all for failure to do so. Undoubtedly, if the bank disobeys the law of the State, it or its officers must abide the consequences. As a patent for land, given by the General Government, is but the deed of the proprietor in fee, and performs merely the office of carrying the title, so the incorporation of a number of individuals by the same Government merely performs the office of creating a legal person and individual, which, domiciled in a State, is subject to its laws, personal as well as civil. If it

can be taxed, or required to pay the taxes assessed upon its shareholders, the law of the State is certainly not impotent to enforce itself; nor has Congress the power to compel a State to permit the operations or tolerate the presence of a corporation which persistently sets at nought its laws. Even if such a corporation is made the agent of the National Government, it must still obey the laws of the State, so far as they do not conflict with those of Congress, or interfere with the operations of the corporation as such agent.

It is said, in the language of the Nisi Prius Court of Pennsylvania, that the mode of enforcing payment of the tax prescribed in Kentucky "compels payment of taxes by non-residents, whose capital was not before the subject of taxation, and who may be compelled to pay a personal tax on the same shares at home." This, it is said, "is clearly contrary to the whole scope and intent of the bank act, and to the particular provisions of the forty-first section."

Is this so? The forty-first section provides, "That nothing in this act shall be construed to prevent *all* of the shares in any of the said associations, held by *any* person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority, *at the place where located, and not elsewhere.*" At the place where *what* is located? Evidently the place of location of the association is intended. *All* shares, of *any* person or corporation, may be taxed there, and not elsewhere. Not, any person or corporation domiciled in the State where the association is established. It seems to us that the meaning of the provision is directly the reverse of that given it by the Pennsylvania Court; and the rights of non-resident owners of stock are expressly protected by the provision that their shares are not to be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

In *Austin* v. *The Mayor of Boston*, briefly quoted in 2 *Am. Law Rev.*, 186, the Supreme Court of Massachusetts held that the true construction of the proviso of the act of Congress, in regard to the *place* of taxation of shares, "does not confine the assessment of the tax to the place where the bank is located, and that it merely requires that the tax, to be valid, shall be imposed under the State authority existing at the place where it is thus located.

It is unreasonable to suppose that Congress intended to prescribe to each State at what particular place within its limits the tax on the shares of the National Banks within these limits should be assessed and collected, or that they should not be collected elsewhere in the same State. The far more rational construction is that it was intended only to provide that the owners should not be made to pay in more than one State; and that by "the place where such bank is located" was meant the *State* in which it might be domiciled. The reason of the law and the motives of the lawgiver here define and fix its meaning. The State laws guard against double taxation of the same personal property within its limits. The object of Congress was not to prevent that which was not at all likely to be done.

In Maine, the judges of the Supreme Court have advised the Legislature that under the National Banking act the shares are required to be taxed in the *city* or *town* where it is located; and have also deduced the conclusion that none of the shares can be assessed elsewhere, or where the owners may reside, and that all the taxes so assessed are to be applied to the benefit of the city or town where the bank is located.—*Taxation of National Banks*, 53 *Maine*, 594. One would suppose that the State would not yet have lost the right to determine for herself what disposition should be made of taxes levied by her authority.

Whether the banks of Kentucky were directly liable for the tax laid upon their shares, and which the cashier was required to pay, was a question of the construction and effect of a statute of the State, upon which the determination of the Court of Appeals was final. That question was not mooted again after its decision, in 1854. That decision settled the law in that State, and the legislative power acquiesced in the construction of the statute. If this Court has jurisdiction to decide whether or not a tax on the shares of stock of the National Banks in that State is constitutional, has it any jurisdiction, under the Constitution and statutes, to review the decision of the Court of Appeals in regard to the *mode* in which that tax, admitted to be constitutional, is collectable? That question, it seems to us, is not one for

this Court to decide, in the exercise of its constitutional power of revision.

The statute of the State in regard to the mode of collecting the taxes assessed upon shares of bank stock, is a local statute law of the State; and it has been often enough decided that the Federal Courts will follow the decisions of the State tribunals on all questions depending upon such laws. The decisions of the State Courts, construing a tax law, are a rule of decision in the Circuit Court.—*Paine* v. *Wright*, 6 *McLean*, 395. When it is once admitted that a tax upon the shares of stock is not a tax on the capital belonging to the bank, and consequently is not a tax on the bonds or securities of the United States in which that capital is invested, the question in what *manner* that lawful tax is to be collected is one within the legislative discretion of the State. It is the question whether a bank can be made liable for impositions or contributions imposed by the State on its stockholders, and this raises no question as to the constitutionality of the mode adopted, under the Constitution of the United States, any more than a State statute would, that made such a bank liable for the torts of its officers, or for the negligence of its cashier, in failing to cause to be protested a note or bill deposited with it for collection. State laws are rules of decision in the Federal Courts, when they prescribe a law governing the right in litigation.

The power to tax these shares, as we have seen, is not taken by the States by grant from Congress or the United States. The act of Congress disclaims all intention of preventing the taxation of the shares of stock as personal property. As it makes no grant of the power to do that, and does not assume to *permit* it, how can it impose conditions upon the exercise, or prescribe the mode of exercising it—a power inherent in the States, and which Congress neither does nor can grant?

The case of *Markoe* v. *Hartranft* proceeds upon the fallacy that there is such a grant of power. Of course, if there were, Congress, competent to wholly forbid the exercise of the power, would have been competent to impose conditions on its exercise. Having no power to forbid it, it could have none to impose any such conditions. If it had the power to grant, it would necessarily have the power to prohibit; and if it could restrict, or limit, or impose conditions on the ex-

ercise of the power, it could forbid it altogether, or impose such limitations or restrictions as would virtually forbid its exercise. So this Court has said that the power to tax an instrument of the Government *at all* involved a power to prevent its operations, and to destroy, and therefore could not be exercised in any degree whatever.

We do not know how this can be made any more plain. But it may perhaps be, if we take, instead of this power to tax shares, the right of eminent domain. Congress cannot forbid a State to exercise this right. It has nothing whatever to do with it. Can it prescribe the mode of its exercise, the conditions on which only it shall be exercised? No, for if it could, it could prohibit it altogether, or destroy it by restrictions virtually making its exercise unprofitable. The right is plenary in the State, wholly; utterly, in all its plenitude and perfection, beyond the reach and control of the National Legislature. There is the same absolute necessity for an express grant of power to the General Government to prescribe to the States the mode in which they shall exercise powers possessed by them before making the Constitution, as for the complete transfer of such powers from the State to the nation. It required an express grant in the Constitution to empower Congress to prescribe to the States a uniform *rule* of naturalization; as much so as to take the power of naturalization wholly away from them.

The decisions of this Court have established it beyond any possibility of cavil, that the Congress has no more power or right to deny or grant to the States the right to tax the shares of stockholders of the National Banks, than to deny or grant the privilege of exercising the right of eminent domain or of defining offences against the peace and dignity of the State, or of providing for tribunals for the trial and punishment of such offences; and it can no more limit any one of these rights, or prescribe how it shall be exercised, than it can wholly deny it.

The State of Kentucky, having the plenary right to tax these shares, had also the right to prescribe the mode of their collection, so as to make the right available. It has done so; and its highest Court has decided the mode adopted by it to be constitutional and legitimate. In whatever manner the tax may be collected, the consequent diminution in the value of the stock is the same. If collected directly

from the stockholders in person, and it were exorbitant in amount, it would as much impede the operations of the bank, and burden its resources, as if it were collected from the bank itself. As the stockholders are, *in fact*, the corporation, so the property, capital, or assets of the bank, (*bona non intelliguntur nisi deducto ære alieno*), after deduction of so much as belongs to its creditors, are the property of the stockholders. The Kentucky statute does not intend to impede, hinder, obstruct, or burden the operations of the bank, but says to the stockholders, "Your shares of stock are lawfully taxed. From many of you the tax cannot be collected, for you are not here in person, but only as a corporation, or by your agent, the corporation. Your agent must pay your taxes. If this hinders its operations, or it cannot *afford* to pay for you, it can only be because its assets are insufficient, and in that case, as it is insolvent, its doors ought to be closed."

In short, if the tax may lawfully be laid, there must be a lawful mode to collect it. A right without means for its enforcement is a barren right, and the right to lay and have the tax includes the right to collect it. There is but one mode in which this can be done. The bank holds funds in trust for the stockholders; and the law can subject these to the payment of the tax. If the State has a right at all to collect the tax, it must needs have the right to do so in the only mode available and effectual, and it is itself and alone the judge, under the Constitution, of the propriety of the mode adopted. Undoubtedly it could declare that a lien to secure the payment of the tax should exist on the shares of stock, or on the interest of the stockholder in the capital and assets of the bank. No law of the United States can constitutionally prevent either.

It is insisted that the tax imposed is "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Kentucky; the highest rate so assessed being forty cents on every one hundred dollars." It is enough to say, as to this, that no such ground of defence is set up in the plea or answer, on which alone the case of the plaintiff in error must rest.

The tax sought to be avoided here is, to sum up the whole matter, neither a tax on the bonds and securities of the Gov-

ernment, nor a tax upon an instrument or agent of the Government, unless it is the bank itself that is taxed.

As the shares are not the property of the bank, but of the shareholders, it is not the bank which is taxed, unless that results as a consequence from the fact that the bank is required to *pay* the tax for the shareholders. When an agent is required to pay the tax assessed against his principal, upon his principal's property, it is not the agent who is taxed. And if the agent in one case, and the bank in the other, insists that he or it cannot rightfully be compelled to pay the tax, is not that a question as to the relations between a principal and his agent, and a bank and its stockholders, and how far one may be made responsible for the other, which depends on the municipal law of the State, and as to which the State Courts are the tribunals of last resort?

ALBERT PIKE,
ROBERT W. JOHNSON,
Of Counsel for the State of Kentucky.

FIRST NATIONAL BANK OF LOUISVILLE

vs.

THE COMMONWEALTH OF KENTUCKY.

No. 103.

In addition to the authorities cited in the argument for the defendant in error, the court is respectfully referred to *The State* v. *Hart*, 2 *Vroom*, 434, in respect to the right of the State to tax the shares of stock belonging to the stockholders.

Also to *The State* v. *Cook, Collector*, 3 *Vroom*, 347, in which it has held that the State tax on the shares of a non-resident stockholder was valid; and the opinion in *Markoe* v. *Hartranft* was declared to be principally *obiter dicta*, not necessary for the decision of the case.

And the court there said that the phrase "included in the valuation of the personal property" of the stockholder, in the act of Congress, only means that the capital and property of the *bank* cannot be taxed, but the shares of stockholders may and must be taxed, substantially as other personal property is, at the place where the bank is located.

It was also held that, for a State tax, that "place" is the State. This, though contrary to the opinions expressed in *Packard* v. *Lewiston*, 55 *Maine*, 456, and *Mayor of Nashville* v. *Thomas*, 5 *Coldwell*, 600, seems to us to be surely right.

We understand that a case has recently been decided by the Supreme Court of Indiana, and one by the Supreme Court of Missouri, by each of which the decision of the [C]ourt of Appeals of Kentucky in this case is fully sustained. [We] shall ask permission of the court to refer to them so soon [as we] have access to them in the published reports.

ALBERT PIKE,
ROBERT W. JOHNSON.

BILL S. No. 537.

To grant the right of pre-emption to certain purchasers on the "Soscol Ranch" in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it may be and shall be lawful for the Commissioner of the General Land Office to cause the lines of the public surveys to be extended over the tract of country known as the "Soscol Ranch," in California, the claim to which by Don Mariana Guadalupe Vallejo has been adjudged invalid by the Supreme Court of the United States, and to have approved plats thereof duly returned to the proper district land office: *Provided*, That the actual cost of such survey and platting shall first be paid into the surveying fund by settlers, according to the requirements of the tenth section of the act of Congress, approved thirtieth of May, eighteen hundred and sixty-two, "to reduce the expenses of the survey and sale of the public lands in the United States."

SEC. 2. *And be it further enacted*, That after the return of such approved plats to the district office, it may and shall be lawful for individuals, bona fide purchasers from said Vallejo, or his assigns, to enter, according to the lines of public surveys, at one dollar and twenty-five cents per acre, the land so purchased, to the extent to which the same had been reduced to possession at the time of said adjudication of said Supreme Court, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries.

SEC. 3. *And be it further enacted*, That municipal claims within the limits of the said "Soscol Ranch," may be entered under the terms, limitations, and conditions of the town-site act of twenty-third of May, eighteen hundred and forty-four.

SEC. 4. *And be it further enacted*, That all claims within the purview of this act shall be presented to the register and receiver within twelve months after the return of such surveys to the district land office, accompanied by proof of bona fide purchase under Vallejo, of settlement, and the extent to which the tracts claimed had been reduced into possession at the time of said adjudication; and thereupon each case shall be adjudged by the register and receiver under such instructions as shall be given by the Commissioner of the General Land Office, to whom the proof and adjudication shall be returned by the local land office, and no adjudication shall be final until confirmed by the said commissioner.

SEC. 5. *And be it further enacted*, That any claim not brought before the register and receiver within twelve months, as aforesaid, shall be barred, and the lands covered thereby, with any other tract within the limits of said "Soscol Ranch," the titles to which are not established under this act, shall be dealt with as other public lands: *Provided*, That no entry shall be made of lands reserved and occupied for military, naval, or other public uses, or which may be designated for such purposes by the President, nor shall any claim under this act extend to mineral lands.

SUPREME COURT of the UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

THE FIRST NATIONAL BANK OF LOUISVILLE, Plaintiff in Error,
VERSUS
THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

BRIEF for PLAINTIFF IN ERROR.

THE CASE STATED.

The plaintiff in error, the "First National Bank of Louisville," was organized under the national currency act of February 23, 1863.

The Secretary of the Treasury, as provided by said act and amendments, designated said bank as a "Government Depository;" in which relation it has ever since stood to the General Government. Its entire capital stock, since its organization, has been and is now invested in United States bonds and securities.

On the first Monday in July, 1865 and 1866, in pursuance to the first section, article second, chapter 83, 2 Revised Statutes Kentucky, and the Act of Assembly of February 9, 1865, the Commonwealth of Kentucky demanded payment from said bank of the sum of one thousand dollars, as of the first Monday in July, 1864, at the rate of fifty cents per share of one hundred dollars, on two hundred thousand dollars of capital stock; of fifteen hundred dollars as of first Monday in July, 1865, at the same rate, on three hundred thousand dollars of capital stock; and of fifteen hundred dollars, as of the first Monday in July, 1866, at the same rate, on three hundred thousand dollars of capital stock. Payment of these sums was refused by the bank, upon the general ground that the acts of Assembly above referred to were in conflict with the Constitution of the United States, and repugnant to the national currency act of June 3, 1864.

To coerce the payment of said sums from the First National Bank of Louisville, the Commonwealth filed the following petition in the Franklin Circuit Court:

COMMONWEALTH OF KENTUCKY
versus
THE FIRST NATIONAL BANK OF LOUISVILLE. } PETITION.

The plaintiff, the Commonwealth of Kentucky, states that the defendant, the First National Bank of Louisville, Kentucky, is a moneyed corporation of loan and discount and a banking association, organized under an act of Congress of the United States, approved June 3, 1864, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and other laws of said Congress.

Said banking association was organized and in operation within this state, at the city of Louisville, previous to the first Monday in July, 1864, and has been ever since and is now in operation, doing a banking business in this state under said name and style. The capital stock of said bank, on the first Monday in July, 1864, was $200,000, or two thousand shares of $100 each. Its capital stock on the first Monday in July, 1865, was $300,000, or three thousand shares at $100 each. Its capital stock on the first Monday in July, 1866, was $300,000, or three thousand shares at $100.

Plaintiff states that, by the laws of the Commonwealth, it was the duty of the defendant, by its officers, to pay into the treasury of the plaintiff, on the first Monday in July, 1864, and annually on the same day in each year thereafter, a tax of fifty cents on each share of stock in said bank, equal to $100 of its capital stock, or on each $100 of stock therein owned by individuals, corporations, or societies.

Plaintiff avers that the defendant did not, on the first Monday in July, 1864, nor has it at any time, paid any tax or money whatever into the public treasury of plaintiff on account of the capital stock or shares held therein. The amount due plaintiff from defendant, and payable by defendant into the public treasury, on the first Monday in July, 1865, was $1,500, and on the first Monday in July, 1866, was $1,500, and plaintiff is entitled to judgment against the defendant for each of said sums, with interest from the dates when they were respectively due as aforesaid, as set out in plaintiff's account, filed herewith, showing the particulars of her demand; and plaintiff prays judgment for said sums, with said interest, and all proper relief.

ACCOUNT FILED WITH PETITION.

The First National Bank of Louisville, Dr.,

To Commonwealth of Kentucky:

To the amount of tax on $200,000 of capital stock, or two thousand shares of $100 each, held on first Monday in July, 1864, at fifty cents on each $100, $1,000; interest from 1st Monday in July, 1864.

To this amount of tax on $300,000 of capital stock, or three thousand shares of $100 each, held on first Monday in July, 1865, at fifty cents on each $100, $1,500; interest from first Monday in July, 1865.

To this amount of tax on $300,000 of capital stock, or three thousand shares of $100 each, held on first Monday in July, 1866, at fifty cents on each $100, $1,500; interest from first Monday in July, 1866.

THE FIRST NATIONAL BANK OF LOUISVILLE
ads.
THE COMMONWEALTH OF KENTUCKY. } ANSWER.

The defendant, the First National Bank of Louisville, comes and defends; and, for answer to plaintiff's petition, says it ought not be compelled to pay the sums charged in plaintiff's petition, to-wit: $1,000, as of first Monday in July, 1864; $1,500, as of first Monday in July, 1865; $1,500, as of first Monday in July, 1866, or any part of said sums, because it says—

1. That the First National Bank of Louisville, defendant herein, is not a moneyed corporation of loan and discount, or banking association, either organized or existing under any law of the State of Kentucky; nor does it derive any of its rights, franchise, or powers from said state, or any law thereof; but defendant says it is a banking association, organized under an act approved February 25, 1863, and existing under an act of the Congress of the United States, approved June 3, 1864, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and other laws of said Congress. Defendant says it has organized under said acts of Congress, and is now, and was prior to the first Monday in July, 1864, operating under the same. Defendant says that, under said law of Congress, there is no authority for the taxation in plaintiff's petition claimed, or any part thereof.

2. This defendant says that, under and by virtue of said act of Congress, in such cases made and provided, the Secretary of the Treasury of the United States has designated this defendant as a government depositary and financial agent of the United States; that it is now, has been, and was prior to the first Monday in July, 1864, acting as such financial agent of the United States within the city of Louisville and State of Kentucky. That as such financial agent, created for the purpose of more effectively carrying on the fiscal business of the United States, the plaintiff can not require of this defendant any tax whatever, either on the bank, its capital, or its shares.

3. This defendant says its entire capital is invested in bonds of the Government of the United States, issued under the act of Congress of February 23, 1862, and subsequent acts of said Congress; that its present capital and shares consist of and represent $300,000 of government bonds and securities; that its shares of stock represent but one interest in said bonds; and that any taxation of either the bank, its capital, or shares is in conflict with the acts of Congress, in such cases made and provided, and with the Constitution of the United States.

4. Defendant says it denies it was the duty of defendant, or its officers, to pay into the treasury of the plaintiff, on the first Monday in July, 1864, and annually on same day in each year thereafter, a tax of fifty cents on each share of stock of defendant, equal to one hundred dollars of its capital stock, or on each one hundred dollars of its stock therein owned by individuals, corporations, or societies, in manner and form in plaintiff's petition set up, or in any other manner and form; or that it was and is the duty of defendant to pay any sum whatever. This defendant says the shares of its capital stock are the property of its individual shareholders; that it has no ownership in them. In fact, this defendant is forbidden by law to own or hold any share of its stock.

Defendant says that at all times it has exhibited, for the benefit of auditors and assessors, and other properly authorized officers of plaintiff, a full and complete list of its shareholders, the number of their shares, and their value, which list can always be seen. It says it has no authority or right to pay taxes for its shareholders, nor ought defendant to be compelled so to do. Now, having fully answered, defendant prays to be dismissed.

A demurrer, filed by the Commonwealth to the answer of defendant, being overruled, the attorney general elected to stand by his demurrer; whereupon, the court dismissed the petition, and adjudged the defendant its costs. To reverse this judgment of the Franklin Circuit Court, the Commonwealth prosecuted an appeal to the Court of Appeals of Kentucky. On final hearing, the appellate court reversed the judgment of the court below, and ordered judgment to be entered against the proper officers of the First National Bank of Louisville for the amount of taxes claimed. To reverse that judgment, this writ of error is prosecuted.

THE KENTUCKY STATUTES.

The acts of Assembly, under which the tax in question is imposed upon national banks, are as follows:

CHAPTER 83—REVENUE AND TAXATION.

Article II., section 1. "On bank stock, or stock in any "moneyed corporation of loan or discount, fifty cents on each "share thereof equal to one hundred dollars, or on each one hun- "dred dollars of stock therein owned by individuals, corporations, "or societies.

Article X., section 1. "The cashier of a bank, and the treasurer "of any other institution whose stock is taxed, shall, on the first "day in July of each year, pay into the treasury the amount of "tax due. If such tax be not paid, the cashier and his sureties "shall be liable for the same, and twenty per cent. upon the amount; "and the said bank or corporation shall thereby forfeit the privi- "leges of its charter." (Rev. Stat. Ky., vol. 2, pp. 239, 266.)

AN ACT INCREASING THE RESOURCES OF THE SINKING FUND.

Section 1. "That it shall be the duty of the officers and man- "agers of the banking associations which have been or may hereafter "be established in this state, under the act of Congress entitled "'An act to provide a national currency, secured by a pledge of "United States bonds, and to provide for the circulation and re- "demption thereof,' to file with the auditor of public accounts a "statement, verified by the affidavit of the presiding officer or "cashier of the association, showing the amount of its capital "stock, and the number of shares into which the same may be "divided; and it shall be the duty of such officers and managers

"annually, on the first Monday in July, to pay into the public "treasury of the state, in aid of the sinking fund, a tax of fifty "cents on each share thereof equal to one hundred dollars of the "capital stock of said association: *Provided, however*, that if the "capital stock shall, at any time, be increased or diminished, it "shall be the duty of such association to revise and amend the "statement required by this act, so as to exhibit at all times "the true amount of capital stock held by such association." Approved February 9, 1865. (Stanton's Suppl. to Ky. Stat., p. 482.)

It will be observed that the tax of $1,000, as of first Monday in July, 1864, claimed by the state, is based upon the statute first quoted, which has been the law in Kentucky many years. The other sums are levied under the act of February 9, 1865, enacted specially to cover the case of organizations under the "National Currency Act."

TAXATION.

The learned Chief Justice of the court below, in the course of his reasoning, says: "It is but reasonable and fair that the state "should have this tax from associations which exist by her laws, "and have franchises peculiarly beneficial and exclusively con- "ferred by her authority."

We agree with him that rights conferred by, and franchises derived through, state legislation unquestionably are the subjects of state taxation. This test of the taxing power is as unerring as it is just. He regards it as a price. Taxation is a price; a price paid for rights conferred and protection enforced. It is an attribute of sovereignty; the sovereign alone can demand it. Such was the doctrine in *McCullough's* case—Judge Marshall saying:

"If we measure the power of taxation residing in a state by "the extent of sovereignty which the people of a single state "possess and can confer on its government, we have an intelligible "standard, applicable to every case to which the power may be "applied. We have a principle which leaves the power of taxing "the people and property of a state unimpaired, which leaves to "a state the command of all its resources, and which places "beyond its reach all those powers which are conferred by the "people of the United States on the Government of the Union, "and all those means which are given for the purpose of carry-

"ing those powers into execution. We have a principle which is "safe for the states and safe for the Union."

If, then, as stated by Judge Williams, the plaintiff in error enjoys its franchises as an exclusive grant from the State of Kentucky, this tax could not be disputed; *but such is not the case.*

The First National Bank of Louisville is in no sense a state creation. It is an organization existing under the national currency act, and derives its corporate capacity, its rights, franchises, and powers from the Federal Government. It exists independent of the state. Hostile legislation would be impotent to harm. It asks no state protection, because it needs none, and is complete as a part of the fiscal machinery of the Federal Government. Upon Judge Williams's own reasoning, therefore, it is clear that the power of taxation, in cases such as the one under hearing, must be derived from Congress as the representative of the paramount sovereignty. This power, to a certain extent, has been conferred upon the states; and, we insist, to be made available, must be strictly and literally followed:

PROVISIONS OF THE CURRENCY ACT.

Section 40. "That the president and cashier of every such "association shall cause to be kept, at all times, a full and correct "list of the names and residences of all the shareholders in the "association, and the number of shares held by each, in the office "where its business is transacted, and such list shall be open to "the inspection of all shareholders and creditors of the associa- "tion, and the officers authorized to collect taxes under state "authority, during business hours of each day in which business "may be transacted."

Section 41. "*Provided*, that nothing in this act shall be con- "strued to prevent all the shares in any of the said associations "held by any person or body corporate, from being included in the "valuation of the personalty of such person or corporation, in "the assessment of taxes imposed by or under state authority, at "the place where such bank is located, and not elsewhere; but not "at greater rate than is assessed upon other moneyed capital in "the hands of individual citizens of such state. *Provided further*, "that the tax so imposed, under the laws of any state, upon the "shares of any of the associations authorized by this act, shall "not exceed the rate imposed upon the shares of any of the banks

"organized under authority of the state where such association "is located."

These two sections furnish the authority for state taxation; and the question to be settled in this court is, whether the acts of Assembly of Kentucky, upon which this suit is based, accord with their provisions. We insist that they do not, and assign the following reasons:

1. The tax levied under those acts is a tax on the capital stock of national banks, and not upon the shares, as provided for in section forty-one.

2. The *mode* of collection is incompatible with the act of Congress.

3. The tax levied is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Kentucky.

IS THIS A TAX ON THE CAPITAL STOCK?

It must be borne in mind that there are two acts of Assembly of Kentucky relied upon in the imposition of this tax: the general law of "revenue and taxation," and the act of February 9, 1865. Both of these laws we have above set out, and both of them we insist levy a tax on the capital stock.

The general law of "revenue and taxation," enacted many years before the adoption of the national currency act, provides a tax "on bank stock, or stock in any moneyed corporation of loan "and discount, fifty cents on each share thereof equal to one hun- "dred dollars of stock therein owned by individuals, corporations, "or societies."

Section 1, Article X. of said general law provides that "the "cashier of a bank, and the treasurer of any other institution "whose stock is taxed, shall, on the first day in July in each year, "pay into the treasury the amount of tax due. If such tax be "not paid, the cashier and his securities shall be liable for same, "and twenty per cent. upon the amount, and the said bank shall "thereby forfeit its charter."

This law, under which the state banks of Kentucky have always been taxed, Chief Justice Williams decides lays a tax upon the shares and not upon the capital stock, and is therefore in strict

conformity with the act of Congress. The same position is taken as to the act of February 9, 1865.

With all deference to the learned judge, we submit that a careful consideration of the above sections together leaves no escape from the conclusion that his position is untenable, and that the intent and meaning of the law is to levy the tax upon the capital stock of state banks.

If a tax upon the share, it is a debt of the shareholder and not of the bank. *Yet under this law the amount of the tax is calculated by charging fifty cents on each one hundred dollars of stock, exacted* in solido *from the bank itself, under penalty of twenty per cent. damages in addition against the cashier and forfeiture of the charter; and still we are told it is nevertheless a tax upon the share and no debt of the bank.*

The shareholder is neither named nor known in the transaction. It is a matter between the state and the bank. The shares of one hundred dollars are used simply as a means of computing the amount of tax on the capital stock. In other words, the law requires the capital of each bank to be divided into *hundredths*, each *one hundredth part* paying a tax of fifty cents. Without this, or some similar contrivance for estimating, how could a tax be levied on capital stock? It must be a certain per centum on each hundredth, five hundredth, or thousandth part, or the like, and either convenience or caprice in Kentucky settled it on each hundredth part. If this law does not provide a tax on capital stock, we confess to an utter ignorance as to how it could be done.

It requires that bank stock in the hands of the bank shall be taxed so much, and the amount shall be paid by the bank—*not shares of stock as held by shareholders, but bank stock.* Nor is there a word said about requiring the bank to pay for the shareholder as a convenience, but it directly, in terms, applies to stock of the banks. *What stock does the bank own except the capital stock, which is identical with itself?*

The law requires the cashier of a bank whose stock is taxed, on the first day in July in each year, to pay *the amount due.* The amount due upon what? Clearly upon the capital stock. If it were otherwise, the law would not be general, and therefore impracticable. The capital of state banks in Kentucky is not always divided into shares of one hundred dollars each; on the contrary, some of the state banks now in operation are divided

into shares of only twenty-five dollars each, and one into shares of five hundred dollars each. To evidence this we quote from the charters of two of these banks, as found in the published acts of the Assembly of Kentucky, both of which are now in active operation; to-wit, the "Merchants Bank of Kentucky" and the "Western Financial Corporation."

The second section of the charter of the Merchants Bank provides that the commissioners named, "or any three or more of "them, may, at such time or place as suits their convenience, open "books for the subscription of stock, which shall be in shares of "*twenty-five dollars each.*" (Acts of 1851.)

Section 6 of the charter of the Western Financial Corporation provides as follows: "The capital stock of said corporation shall "be one million dollars, with the privilege to said corporation to "increase the same to five millions of dollars, and shall be divided "*into shares of five hundred dollars.*" (Session Acts, 1865.)

Now, these two banks are taxed annually under the law we have quoted, *supra*, because in Kentucky there are no other laws upon the subject. The language is, "*fifty cents on each share thereof equal to one hundred dollars of stock.*" If that means a tax upon the share, as the Court of Appeals holds, the shares in the said banks being respectively twenty-five and five hundred dollars, and the law providing only for a tax on shares equal to one hundred dollars, *nothing could be clearer than that no tax at all is levied on their shares.* This is the legitimate sequence of the decision of the Court of Appeals; and, from their opinion, the conclusion is inevitable that upon the shares of two of the state banks whose charters are above quoted NO TAX IS ASSESSED. From which it follows that the law sought to be enforced herein is in conflict with that part of the forty-first section of the national currency act, which provides that the tax so imposed under the law of any state upon the shares of associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located.

Without doubt, this proviso is contravened when all state banks other than those whose shares are one hundred dollars escape taxation. Yet these banks annually pay a tax of fifty cents on each one hundredth part of their capital stock. Is it not, then, a tax upon the capital stock? If all bank shares in Kentucky were

one hundred dollars each, the court below might more plausibly assume the tax to be upon the shares; but when we remember that the shares vary from twenty-five to five hundred dollars, the only manner in which taxation can be sustained at all, under the statute, is to hold it as laid upon the capital stock. How does the cashier of the twenty-five dollar share bank pay the tax? On each share? No; because the law lays the tax on one hundred dollars of stock, so that it takes four of his shares to reach that amount, and instead of paying fifty cents a share, it will be but the fourth of it; and so, also, changing the figures, will it be of the banks whose shares are more than one hundred dollars.

The objections which we make to the general law are also urged against the enabling act of February 9, 1865. Under that law, as well as the former, the capital stock is taxed. The same general language is used, and the same requirements as to mode of payment prescribed. It requires the cashier of national banks to file with the auditor a sworn statement, showing the amount of *capital stock*, and requires him to pay the tax yearly of fifty cents on each share thereof, equal to one hundred dollars of the capital stock.

If this is a tax upon the share, why does the law go on to say: "*Provided, however*, that if the *capital stock* shall at any time be "increased or diminished, it shall be the duty of such association "to amend the statement, so *as to exhibit at all times the true* "*amount of capital stock held by such association*"?

That this is a tax upon the capital stock, and not upon the share, is clearly shown by this suit for the recovery of the tax, as brought by the attorney general. The bank itself, and not its shareholders, is sued. It is the *corporation*, as represented by the president and cashier, upon which the tax is laid, and from which it is sought to be coerced. The petition so reads. The bill of particulars upon which the petition is based is made against the First National Bank of Louisville; and the first charge is, as debtor to the State of Kentucky, "to the amount of tax on $200,000 of capital stock." We submit, therefore, with earnestness, in view of the foregoing considerations, that the court below erred in ruling that the tax levied herein is on the share, and not upon the capital stock.

A TAX ON THE CAPITAL STOCK OF PLAINTIFF IN ERROR CAN NOT BE COLLECTED.

First. Because of its investment in government bonds. It is alleged in the third paragraph of the answer, and admitted by the state, that the *entire capital stock* of the plaintiff in error is now, and has been ever since its organization, invested in government bonds and securities. A tax upon the capital stock is a tax upon the bonds and securities of which it is exclusively composed. No tax can be imposed by the laws or authority of any state upon the bonds in which the capital of plaintiff in error is invested, nor upon any person, society, or corporation, in the relation of owner of said bonds; yet this would be done by taxing the capital stock of plaintiff in error.

These doctrines are well settled by adjudged cases in this and other courts. *Weston* vs. *City of Charlestown*, 2 Peters, 449; *Bk. Commerce* vs. *Commis.*, 2 Black. 620; *The People* vs. *Commis.*, 2 Wallace, 200; *Whitney* vs. *City of Madison*, 23 Indiana, 331.

Secondly. Because of its character as an agency and instrument of the powers of the Federal Government. This is no open question. If there be any one principle of constitutional law now universally acquiesced in, it is that the powers, agents, and means employed by Congress to carry into effect the powers vested by the constitution in the Federal Government must be free from state taxation and control. Taxation would impede, burthen, and perhaps destroy the constitutional laws of Congress, and hostile legislation revolutionize our national economy. Such protection is necessary to uphold the nation's credit and preserve the nation's life. In a word, it is settled by adjudged cases in this court that the plaintiff in error, as a bank in its corporate capacity, can not be made the subject of taxation by state law or state authority upon its franchise, operations, or capital stock, but that it is wholly exempt from such taxation by reason of its relation to the national government as an agency or instrument in the exercise of its constitutional powers. *McCullough* vs. *State of Maryland*, 4 Wheaton, 316; *Osborne* vs. *U. S. Bank*, 9 Wheaton, 738; *Dobbins* vs. *Commis.*, 16 Peters, 435; *The People* vs. *Commis.*, 23 N. Y. R. 204. The tax imposed in this case upon plaintiff in error is, in substance and in fact, a tax upon the operations of the bank itself, and as such is emphatically condemned by the authorities we have just cited.

CAN THE LAW BE ENFORCED AS A TAX ON THE SHARES?

In delivering the opinion of the court below, the Chief Justice declares that the acts of Assembly relied on as imposing the tax herein levies the tax on the shares, and not on the capital stock. This is a mere declaration. It is taken for granted, and no reason is assigned or argument adduced in support of the position. He disposes of the question summarily; and, having relieved himself of that obstacle, he proceeds by a process of ingenious reasoning to sustain the law.

We think we have shown conclusively that Kentucky state banks, as well as national banks, under the enabling act of February 9, 1865, are taxed upon their capital stock; but suppose the position of Judge Williams on this point is correct, suppose these laws do lay a tax simply on the shares of plaintiff in error, can it be collected? We insist that it can not, and suggest the following objections:

First. BECAUSE THE MANNER OF COLLECTING THE TAX LEVIED CONTRAVENES THE NATIONAL CURRENCY ACT, AND MAKES IT IN EFFECT A TAX ON THE BANK ITSELF.

"To suppose that Congress intended that the states should "exercise the sovereign power as to taxing shares in national "banks that they by their state laws exercise as to their own "bank shareholders, and then to quibble about the means of col- "lecting the tax, is beneath the dignity of the question."

Such is the position of the court below in delivering its opinion upon the mode of collection prescribed by the acts of Assembly. The mode and manner stand for naught. The right to tax at all, as claimed by the state, is simply *permissive*, and a mere delegation of authority to that extent. We submit, therefore, that in order to be lawful in the exercise of this authority, the state must perform it in the manner and to the extent permitted by the grant, *and in no other way*. Hence we conclude that the plaintiff in error, as one of those national agencies organized under the national currency act, or its shareholders, can only be taxed by the states in the manner, form, and to the extent provided for in that act. Congress could never have intended to subject these organizations, in any event, even formally, to the control of the states. It gives the states rights over the shareholders, but the corporation itself is free from state action. As we have said, it

is no creation of the state. State legislation gives it no privilege, franchise, or right. It exists under the protection of the Constitution of the United States, and, in its corporate capacity, is as free from the control of the states as the forts, dock-yards, arsenals, etc., of the General Government. By what authority does the State of Kentucky say to the managers of these Federal agencies you must pay us so much taxes? From her inherent right of state sovereignty? No; for as to these Federal agencies she is no sovereignty. It must be, then, under this permissive power derived from the national currency act.

Judge Williams says the mode and means of collection are immaterial matters, and that each state must provide its own means. Had Congress been silent upon this point, there might possibly be ground for difference of opinion; but, inasmuch as Congress has not only provided what tax shall be levied by state authority, but has explicitly pointed out the manner and mode of collection, we take it that the mode of collection is as imperative as the extent.

The 40th section of the act provides "that the president and "cashier of every such association shall cause to be kept at all "times a full and correct list of the names and residences of all "the shareholders, and the number of shares held by each, and "such list shall be subject to the inspection of all the shareholders "and creditors of the association, and the *officers authorized to* "*collect taxes under state authority.*"

And the 41st section provides "that nothing in this act shall "be construed to prevent all the shares in any of the said asso-"ciations, held by any person or body corporate, from being "included in the valuation of the personal property of such "person or corporation, in the assessment of taxes under state "authority."

Now, this is the mode provided by Congress, an adherence to which, we insist, is the only effectual way of securing the right of taxation by the states. The manner and extent are both provided for.

These shares in the hands of the shareholders are to be included in the assessment of their personal estate; and, in order that the state officers may have every facility to arrive at the exact number of shares held by each person, the bank is required to keep, at all times, a list of names of stockholders, number of shares held by

each, etc. If Judge Williams be right, and the means of collecting the tax be nothing, why is Congress careful to insert the foregoing provision? If the states can coerce the bank itself to pay the tax *in solido* for its stockholders, whence the necessity of the list of stockholders to be open for the inspection of the taxing officers of the state?

It was unquestionably with a view to prevent just such cases as this that Congress particularly prescribed the *mode* of collection as well as the extent. It was to prevent these organizations from being made the servants and agents of the states in the collection of taxes; to do which would be to clothe the state with an authority not justified by the constitution, and denied by this court. Without remuneration, and without right, we insist the Commonwealth of Kentucky is undertaking to force the plaintiff in error, in its corporate capacity, to collect this tax from its shareholders, and pay the same into the state treasury. *Not only so, but penalties of a grave and serious character are imposed upon the bank and its officers in the event of neglect or refusal.* Can this burden be imposed? Is it in accordance with the provisions of the act of Congress and the decisions of this court? We think not. This court has gone so far in protecting the means, instruments, and agencies employed by the National Government, in carrying into effect its powers under the constitution, as to deny the authority of a state to impose a tax on the salary of the captain of a revenue cutter, upon the ground that such a tax might interfere with the collection of the revenue. (*Dobbins* vs. *Commis.*, 16 Peters, 435.) This plaintiff in error is a government depositary and fiscal agent; with how much more reason, then, can this court say that in the transaction of its business as such agent it is not to be impeded and burdened by being compelled to collect state taxes from its shareholders. With great propriety it may say to the State of Kentucky, you have your assessing officers; send them to the First National Bank, where they will find a list of all stockholders, and let them assess for themselves the shares of stock for taxation; but you shall not transform that national agency into a state servant, and compel it to perform a burdensome duty, not enjoined by its charter, which would be done by requiring it to collect this tax and pay it into the state treasury. If, in the estimation of this court, to say a tax upon the salary of a revenue cutter captain would impede the collection of the revenue, and the

right so to do was therefore denied, this tax of time, patience, and coerced responsibility, interfering with the fiscal agents of the government, must be condemned. Every burden imposed by a state, which may interfere with and impair, to any extent, the free and perfect command and use of all the appropriate instrumentalities of the General Government, is forbidden; the tax in this case, as sought to be collected from the bank itself, is such a burden.

Such is the position of the Supreme Court of Pennsylvania, as taken in a case directly in point. The statute of Pennsylvania, in the same manner as the Kentucky statute, provided for a payment of the tax *in solido* by the bank. (22d Feb., 1866, Penna. Acts.) A tax was imposed, and to prevent its collection, *Markoe* and *Thompson*, stockholders of the "National Bank of Commerce," filed their bill, seeking to restrain its collection, and made the auditor general and state treasurer defendants. Judge Agnew, in delivering the opinion of the court, considered the question upon these points:

1. The subject reserved by Congress for state taxation;
2. The mode prescribed for its exercise;
3. The mode adopted in the Act of 1866; and said: "The sub-"ject of taxation is already stated in the first proviso of the forty-"first section of the United States Bank Act of 3d June, 1864, to "be the shares of the individual shareholder. The personal interest "of the stockholder in the shares he owns, as contradistinguished "from that of the corporation in its capital and property, was "considered and determined by the Supreme Court of this state "in the case of *McKeen* vs. *Northampton County*, 13 Wright, 519, "and accords with the doctrine of the later decisions of the "Supreme Court of the United States in reference to the subject "now before me. This interest is personal, goes with him, and "its succession when he dies is governed by the law of his domicile. "It is clearly distinguished from the capital and property of the "corporation which are vested in it, as the legal or artificial entity "and owner, and are subject to the laws of the state which gave "it being. The forty-first section of the bank act of 1864 is "framed in view of this distinction. It first imposes certain taxes "upon the corporation—association as it is termed—in 'lieu of all "existing taxes.' Then the first proviso declares that nothing in "the act shall be construed to prevent *all the shares* in any of "the said corporations, *held* by *any person*, from being *included in*

"the *valuation* of the *personal* property of such persons in the "assessment of taxes, imposed by or under state *authority*. After "this comes the third proviso, subjecting the real estate of the "association or corporate body to that taxation.

"The individual character of this personal interest in the shares "of these associations, as taxable apart from the institutions "themselves, is fully sustained by the bank tax cases in the "Supreme Court of the United States, 3 Wallace, 573, 585, 586; "and is re-asserted by Justice Nelson in *The People of New York* "ex rel. *Ralph Mead*, in which it was held, resulting from this dis- "tinction, that the ownership of the shares was so clearly different "from that of the corporation in its capital, the shareholders could "obtain no deduction from their valuation for that portion of the "capital invested in United States bonds.

"The nature of the taxable interest in the shares bears directly "upon the *mode* of taxation provided by Congress, which is the "second point. As thus understood, the first proviso will read "thus: 'That nothing in the act shall prevent the *individual per-* "*sonal interest* of the shareholder in his means from being in- "cluded in the valuation of the personal property of such person, "in the assessment of taxes imposed by or under state authority.' "We can not reject these words: '*from being included in the valu-* "*ation of the personal property of such person.*' Congress meant "something by this language. It did not say that nothing shall "prevent such share from being taxed by or under state authority; "that would have left the mode of exercising this authority to the "states.

"But, not to stick in the letter, there is good reason for adopt- "ing this mode. If by omitting to prescribe a mode the authority "to tax the shares in the national banks could be exercised, by "compelling the payment of the tax over the counter of the bank "itself, it would subject the bank to a *quasi* foreign and sometimes "hostile jurisdiction. This is evidently not intended by Congress. "It would also subject the citizens of other states and counties to "taxation upon a moneyed capital never brought within state "jurisdiction otherwise than by the purchase of the shares. Im- "partiality in the exercise of the Federal power therefore required "that the states should be limited in the mode as well as in the "extent of the taxing power conceded to them under this proviso. "In the clause fixing this extent the mode is again referred to. It

"is to be at no greater rate than is *assessed* upon *other* moneyed "capital *in the hands* of individual citizens of the state.

"To this is to be added the provision in the fortieth section for "the keeping of a full and correct list of the *names, residences*, "and *the number of shares* of all the stockholders, which the "section declares shall be open to the *inspection* of the officers "authorized to *assess* taxes under state authority. Thus the pre- "cise duty of the bank in relation to the taxation of the shares "is defined to be that of furnishing to the state officers the means "of making the assessment by inspection; but the *assessment of* "*the shares is clearly referred to the officers authorized to assess.*

* * * * * * * * * *

"In the second place, what is the operation of taxation in the "mode proposed in the state act of 1866, as authorized by the "auditor general? Its effect is to transform the national associa- "tion into a state agent, and to compel it to perform a burdensome "duty not enjoined by its charter, without authority and without "compensation. *This is done by making it the duty of its officers* "*to collect the tax annually from every stockholder, and to pay it* "*into the state treasury.* It also depreciates the stock to the "extent of the burden imposed on the 'corporation.'

"In the third place, it compels payment of taxes by non-resi- "dents whose capital was not before the subject of taxation, and "who may be compelled to pay a personal tax on the same shares "at home. Clearly this is contrary to the whole scope and intent "of the bank act, and to the particular provisions of the forty- "first section.

"A state corporation, deriving its powers and privileges from "the law, may be regulated and controlled by it. But a national "bank derives neither its existence nor its franchises from the "state, and therefore owes it no special duty, and can not be bur- "dened by an imposition upon its privileges. It is unlike, in this "respect, a foreign corporation, which can exercise its functions "here only by permission of the state. The supreme authority of "the Union, which establishes it here, also protects it from inter- "ference. The state may send her assessor to the shareholder, "and to find him out the assessor may call on the bank for infor- "mation, for this is permitted; *but what right has the state to com-* "*pel the bank to act as her agent in collecting the taxes from the share-* "*holders, and to burden it with the trouble and expense and respon-*

"*sibility of collecting and paying them over into the state treasury?* "What remedy has the bank against the shareholder if he refuses "to pay, or previously assigns over his shares or dividends? The "tax is not a specific lien on the stock or dividend.

* * * * * * * * * *

"The settlement being with the bank, and not with the stock- "holder, he can not appeal. As to the bank, the settlement would "be *in solido* for the whole tax, and the individual tax would not "appear separately. At all events, he is no party, his name being "unknown in the settlement. He can not sue the state to recover "back his tax, and if he could recover it from the bank as a mis- "payment, it can only be upon the ground that the bank was not "amenable to the state jurisdiction." (*Markoe and Thompson, Stockholders of the National Bank of Commerce* vs. *Jno. Hartranft, Auditor General, etc.* This case has not yet been reported, but will, we presume, be found in the forthcoming volume of Pennsylvania Reports.)

A CONCESSION OF THE RIGHT AS CLAIMED CARRIES WITH IT MEANS FOR ITS ENFORCEMENT.

We call the attention of the court to the further fact, that a concession to the State of Kentucky of the right to enforce the payment of the tax sued for herein, carries with it necessarily the right of the state to exact penalties from the bank and its officers to secure its enforcement. This right, if conceded, may, and actually does, involve the destruction of these national agencies.

The general law of Kentucky on *the* subject of revenue and taxation, quoted *verbatim* (*supra*), has not been repealed or amended, and *is applied directly to this case by the Court of Appeals.*

"If such tax be not paid, the cashier and his securities shall be "liable for the same, and twenty per cent. upon the amount; and "the *said bank or corporation shall thereby forfeit the privileges* "*of its charter.*" Such is the law upon which this proceeding is based, and applied by Judge Williams in saying the officers of plaintiff in error can be legally compelled to pay these taxes for their respective shareholders; and he "adjudges the amount against the proper officers, as provided in our state enactment."

Now, it will be seen by a reference to this "state enactment," just quoted, that the amount adjudged against the plaintiff in error is not fifty cents on each one hundred dollars of stock, but

a penalty of twenty per cent. is added, and *forfeiture of the charter*.

Concede then, as we have said, the right to insist on payment from the bank, and these penalties follow as a consequence. Can it be possible that any court in the land will declare that the charters of these national fiscal agencies are at the mercy of state legislation? Yet such will be, and is, the effect of sustaining the Kentucky statutes.

Here is a penalty ordered against the officers of plaintiff in error for contesting, on constitutional grounds, a law compelling them to do what they believed they had no right to do. The court below says it is a tax on the shares required of the bank. The bank does not and can not own its shares, and can act only as agent for its shareholders. Considering it unlawful, the bank refused its payment; because, if paid, the shareholder would have no recourse. He is not a party, nor could he sue to recover. The wrong would have no redress. Yet this refusal, this contest, on constitutional ground, for the protection of shareholders, brings with it the destructive penalties announced. With what money will the bank pay this tax? You can not require one man to pay another's debts except by contract, nor can you require the bank to pay its shareholders' taxes with funds of its own. The stockholder's interest in the bank is evidenced by his share, and is a certain proportion of the capital stock, and the profits arising from the employment of that capital. The profits, therefore, as evidenced by the dividends, are the shareholders' money, and the theory of the Kentucky statute is that the bank will pay the tax out of their profits.

But suppose there are no profits, and, as a consequence, no dividend; suppose that, instead of making money, by reason of failing debtors and correspondents the bank loses: under such circumstances the stockholders would have no money in the bank in the shape of profits to be applied to the payment of taxes. What must be done then? *Must the bank borrow money from its deposit account to pay, under a penalty of twenty per cent. and forfeiture of its charter?* Now, all this need not be. A simple compliance with the act of Congress would relieve all difficulty, and in the case suggested, to secure the collection of the taxes, it would only be necessary for the assessor to go to the bank and obtain the names of stockholders and the number of shares. The shares

are theirs, they are valuable, and the taxes must be paid by them whether profits are made or not.

Judge Williams in his opinion says that to require the banks to pay is the only convenient and reasonable mode of collection, and yet in the case of the bank without profits, it would be neither reasonable nor just, whilst the mode pointed out by Congress would be not only reasonable and just, but effective. But, we repeat, it is no question of convenience, it is a question of right. It matters not how inconvenient may be the means provided by Congress. When it is remembered as a matter of grace alone, it occurs to us that it is no hardship to require the state to comply with the power as given. It is meet that the donor's wishes as to the gift should be remembered and obeyed.

This plaintiff in error has rendered every assistance in its power. It has complied with the fortieth section of the law, and at all times has in its office, for the inspection of assessors of taxes, a list of its stockholders, the number and value of their shares. It can do no more, and now most earnestly insists upon its rights to be protected from penalties, forfeitures, and hostile state action; all of which are comprehended and enforced by the statutes imposing this tax.

Second. THE RATE OF TAXATION IS HIGHER THAN ALLOWED BY CONGRESS.

The second objection we make to the acts of Assembly as construed, is that the rate assessed—fifty cents on each one hundred dollars of capital stock—is in conflict with the first proviso of the forty-first section of the national currency act. The tax imposed under state authority "shall not be at a greater rate than is "assessed upon other moneyed capital in the hands of individual "citizens of that state." The taxes sued for herein are for the years 1864, 1865, and 1866. Now, we assert it to be true, and it is shown by the published laws, that the tax assessed upon moneyed capital in the hands of individual citizens of Kentucky during those years, was at a less rate than that imposed upon the plaintiff in error, and on this point we challenge contradiction.

If, then, we have failed in establishing the point that a failure to comply with the mode of taxation is fatal, upon the authority of *Van Allan* vs. *The Assessors*, 3 Wallace, 584, the incompatibility between the extent and rate prescribed by the Kentucky statute and the act of Congress emphatically condemns it.

IS THE RATE HIGHER?

The tax imposed on the national banks is fifty cents on each one hundred dollars; that imposed on individual moneyed capital is variable, but at no time has it been higher than forty cents on each one hundred dollars. The rates for the years mentioned will be seen from the following statement: For the year 1864, the tax was 30 cents on each $100; for the year 1865, the tax was 40 cents on each $100; for the year 1866, the tax was 40 cents on each $100; for the year 1867, the tax was 30 cents on each $100. The laws under which this tax on residuary, as it is called in Kentucky, is levied are as follows:

"SEC. 1. *Be it enacted by the General Assembly of the Common-*
"*wealth of Kentucky*, That the first section of an act entitled 'An
"act to amend the Revenue Laws,' approved February 10, 1845,
"be so amended that hereafter it shall be the duty of the several
"assessors of tax in this commonwealth, after having taken a list
"of all property required to be specifically listed, to require each
"person on oath to fix the amount he or she is worth from all
"other sources, on the day to which said list relates, after taking
"out his or her indebtedness from said amount he or she is worth,
"exclusive of property in lands, slaves, or other property not
"within this commonwealth, but subject to taxation by the laws of
"the country where situated, and the said assessors shall take
"from the said amount so assessed and listed the sum of one
"hundred dollars, and set down and list the balance for taxation,
"upon which the same *ad valorem* tax shall be paid as on other
"property subject to taxation by existing laws." * * * * *
(Session Acts, 1851–52, p. 362.)

Now, the *ad valorem* tax on other property subject to taxation at the time of the passage of this law was seventeen cents on each one hundred dollars, as appears from Section 1, Art. I., 2 Rev. Stat., Chap. 83, page 238:

"*Be it enacted by the General Assembly of the Commonwealth of*
"*Kentucky*, That an annual tax of seventeen cents upon each one
"hundred dollars of value of the real and personal estate, directed
"to be assessed for taxation, shall be paid by the person assessed."

Individual moneyed capital was taxed at that rate—seventeen cents on the one hundred dollars—until the year 1856, when the exigencies of the state required an increased rate. In that year

the rate was increased to twenty cents by the following act of assembly:

"*Be it enacted by the General Assembly of the Commonwealth of* "*Kentucky*, § 1. That an additional tax of three cents be and the "same is hereby imposed for the year 1856, and each succeeding "year, upon each one hundred dollars in value of property in this "state, for the purpose of increasing the common school fund." (Acts 1855–56, page 11.)

Twenty cents remained the rate until 1862, when five cents additional was ordered by the following act of assembly:

"*An act to amend an act entitled, 'An act for the regulation of the militia,' etc., and to provide further for the public defense.*

* * * * * * * * * *

"Section 4. That, for the purpose of providing means for the "payment of the debts created by the state under the provisions "of this and the act to which it is an amendment, an additional "tax in aid of the sinking fund, commencing with the year 1862, "of five cents upon each one hundred dollars of value of the real "and personal estate, directed by law to be assessed for taxation, "shall be paid by the person assessed." (Acts 1861, '62, '63, page 5.)

By act of March 4, 1862, five cents additional was ordered, making the tax for the years 1862, 1863, and 1864, thirty cents on each one hundred dollars, which act is as follows:

"*Be it enacted by the General Assembly of the Commonwealth* "*of Kentucky:* Section 1. That hereafter, commencing with the "year 1862, an additional annual tax of five cents on each one "hundred dollars of value of the real and personal estate subject "to taxation for revenue purposes in this commonwealth shall be "paid by the person assessed, to be applied to the ordinary expenses "of the government." (Acts 1861, '62, and '63, page 76.)

By act of March 4, 1865, another increase of five cents was ordered as follows: "Section 1. That hereafter, commencing with "the assessment of the year 1865, an additional annual tax of five "cents upon each one hundred dollars of value of the real and "personal estate subject to taxation for revenue purposes in this "commonwealth shall be paid by the persons assessed, to be "applied to the ordinary expenses of the government." (Acts 1865, page 90.)

The act of June 5, 1865, provided an increase of five cents, in

identical language, making it unnecessary to quote. (Acts 1865, page 125).

Thus it will be seen that in the years 1865 and 1866 individual moneyed capital was taxed at the rate of forty cents on each one hundred dollars, which is the highest rate ever assessed in Kentucky. By act of 2d March, 1867, Acts 1867 and '68, the rate was decreased to thirty cents, which is the present rate. These laws establish conclusively that, notwithstanding the equality and fairness so ingeniously shown in the opinion of the court below, the national banks of Kentucky have been actually discriminated against, and in the year 1864 were taxed twenty per cent., and in other years ten per cent., on the one hundred dollars higher than individual moneyed capital. Will not this of itself pronounce the laws levying the tax herein unconstitutional?

To sum up, we contend these laws are unconstitutional:

I. They levy a tax upon the capital stock of plaintiff in error, and not upon its shares. This is forbidden, because

1. The entire capital stock is invested in bonds of the United States, and a tax on that is on the bonds composing it.

2. By reason of its relation to the Federal Government as one of its fiscal agents.

II. If, as held by the Court of Appeals, a tax on the shares, it can not be collected:

1. Because the mode of collection is in contravention of the currency act, and renders it in effect a tax on the bank itself.

2. Because the rate assessed is greater than that assessed on moneyed capital in the hands of individual citizens of Kentucky.

Wherefore we ask a reversal of the judgment of the Court of Appeals, and that they be required to order an affirmance of the judgment dismissing the petition.

PIRTLE & CARUTH,
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